Michigan Law Review

Volume 90 | Issue 3

1991

Structural Free Exercise

Mary Ann Glendon
Harvard University

Raul F. Yanes
U.S. Court of Appeals for the Seventh Circuit

STRUCTURAL FREE EXERCISE

*Mary Ann Glendon**
and *Raul F. Yanes***

INTRODUCTION

For some three decades, beginning in the mid-1950s, the Supreme Court lavished so much attention on certain political and civil liberties that it has become common to speak of a "rights revolution" as having taken place in constitutional law. The American legal landscape has been profoundly transformed by the heightened protection the Warren and Burger Courts accorded to the rights of women and minorities to nondiscriminatory treatment and of criminal defendants to fair procedures; by the remarkable development of privacy law; and by the high priority the Court has given to freedom of speech and of the press. The major landmarks of the judicial rights revolution — *Brown v. Board of Education,*[1] *Miranda v. Arizona,*[2] *Baker v. Carr,*[3] *Griswold v. Connecticut,*[4] *New York Times v. Sullivan,*[5] — have not only affected the way Americans live, but the way we envision the problem of ordering our lives together in a large heterogeneous republic. Over the same period, however, the Court significantly constricted protection of freedom of religion through a narrow interpretation of "free exercise" and an expansive view of what kind of governmental activity amounts to "establishment" of religion.[6] Whatever the position of religious freedom on the Court's "Honor Roll of Superior Rights"[7] in those years, it was not at or near the top.

With changes in the composition of the Court, a majority of the

* Professor of Law, Harvard University. B.A. 1959, J.D. 1961, M.C.L. 1963, University of Chicago. — Ed.

** Clerk to Judge John L. Coffey of the U.S. Court of Appeals for the Seventh Circuit. A.B. 1987, Dartmouth; J.D. 1991, Harvard. — Ed.

1. 347 U.S. 483 (1954).

2. 384 U.S. 436 (1966).

3. 369 U.S. 186 (1962).

4. 381 U.S. 479 (1965).

5. 376 U.S. 254 (1964).

6. In our view, the religion language of the First Amendment is in the service of a single fundamental freedom, referred to in that amendment as the "free exercise" of religion. *See infra* notes 308-11 and accompanying text. In this article, therefore, we use the terms *free exercise of religion, religious liberty,* and *freedom of religion* interchangeably.

7. The expression is Henry Abraham's. *See* HENRY J. ABRAHAM, FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES 74 (5th ed. 1988).

current members seems disposed to give some reconsideration to the Religion Clause[8] jurisprudence, a body of law that has been described on all sides, and even by Justices themselves, as unprincipled, incoherent, and unworkable.[9] Whether this process of clarification will lead to increased protection for the freedom of religion, however, is an open question. For, though most of the current Justices separately have expressed discontent with the state of the law in the church-state area in dissents and concurring opinions over the years, the Court as a whole seems to be veering toward a posture of reflexive deference to the elected branches of government where religion issues are concerned.[10]

In Part I of this article, we analyze the development of case law interpreting the religious freedom language of the First Amendment from the 1940s to the eve of the rights revolution as a casualty of the piecemeal approach to incorporation, compounded by a series of judicial lapses and oversights. Part II deals with the fate of the Religion Clause in the era of the rights revolution, when the free exercise and establishment provisions were deployed in the service of a constitutional agenda to which they were, in themselves, largely peripheral. The current period of doctrinal change is the subject of Part III, where the implications of the emerging deferential approach for religious freedom are explored. In Part IV we argue that a holistic, structural approach to the text is necessary if the Court is to develop a workable, coherent, church-state jurisprudence for our pluralistic, liberal, democratic society. If rigid separationism is not to be succeeded by an equally mechanical form of deference, the Court must now grapple seriously with the formidable interpretive problems that were overlooked or given short shrift in the past. The task is an urgent one, for it concerns nothing less than the cultural foundations of our experiment in ordered liberty.

---

8. Since a major purpose of this article is to criticize the interpretive process through which the First Amendment came to be understood as embodying two separate values at odds with one another, *see infra* notes 59-70 and accompanying text, we depart from the standard practice of referring to that amendment's religion language as containing two clauses. We treat the First Amendment as containing a single, coherent Religion Clause whose establishment and free exercise provisions are both in the service of the same fundamental value: religious freedom.

9. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1155 (2d ed. 1988); Michael W. McConnell, *The Religion Clauses of the First Amendment: Where is the Supreme Court Heading?*, 32 CATH. LAW. 187, 187-88 (1989); Mark V. Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 702 (1986); *Developments in the Law: Religion and the State*, 100 HARV. L. REV. 1606, 1609-10 (1987) [hereinafter *Developments in the Law*]; *see also* Walz v. Tax Comm., 397 U.S. 664, 668 (1970) (Burger, C.J.); Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).

10. The Court's decision in Employment Division v. Smith, 110 S. Ct. 1595 (1990), strongly lends itself to this interpretation. *See infra* Part III.

I. INCORPORATION AND THE FAILURE OF LEGAL IMAGINATION

The Supreme Court's modern Religion Clause jurisprudence grows out of the Court's decision in the 1940s to apply the religion language of the First Amendment against the states. Before 1940, the Court "had never upheld a claim of free exercise of religion, had never found any governmental practice to be an establishment of religion, and had never applied the religion clauses of the First Amendment to the states."[11] The decisions of the 1940s that gave new legal life to the religion language of the Bill of Rights were part of the decades-long process that has come to be known as incorporation. As early as 1925 in *Gitlow v. New York*,[12] the Supreme Court began to hold that the Due Process Clause of the Fourteenth Amendment required the states to abide by portions of the first eight amendments. But the Court offered no systematic account of this historic constitutional transition until 1937 when, in *Palko v. Connecticut*,[13] Justice Cardozo undertook to explain why it had made sense to take a piecemeal approach, rather than to incorporate the entire Bill of Rights.

The teaching of *Palko* is that the Bill of Rights contains an implied hierarchy of constitutional values. According to Cardozo, certain rights are so "implicit in the concept of ordered liberty" and " 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "[14] These especially important "fundamental" rights are to be distinguished from various other rights (such as the double jeopardy provision involved in *Palko*) in the absence of which "[j]ustice . . . would not perish."[15] The concept of due process, Cardozo explained, required that the former, but not the latter, be made binding on the states. Cardozo did not suggest any more sophisticated ranking than "in" and "out," nor did he offer an exhaustive catalog of the rights that ought to be "in." But he made it plain that freedom of speech, thought, and religion were among them.[16] Of these, Cardozo's rhetoric implied, speech was the most essential. The freedom of thought and speech, he wrote, was the "matrix, the indispensable con-

11. JOHN T. NOONAN, JR., THE BELIEVER AND THE POWERS THAT ARE xiii (1987). Prior to the incorporation period, the Court had considered only three important Religion Clause cases: Quick Bear v. Leupp, 210 U.S. 50 (1908) (upholding tuition grants for Sioux Indians in Catholic schools); Bradfield v. Roberts, 175 U.S. 291 (1899) (upholding federal funding of a Catholic hospital in the District of Columbia); and Reynolds v. United States, 98 U.S. 145 (1878) (upholding federal prohibition of polygamy even where polygamy was based on religious belief).

12. 268 U.S. 652 (1925).

13. 302 U.S. 319 (1937).

14. 302 U.S. at 325 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

15. 302 U.S. at 326.

16. 302 U.S. at 324.

dition, of nearly every other form of freedom."[17]

The Court's first explicit application of the First Amendment's religion language against the states came three years after *Palko* in *Cantwell v. Connecticut,*[18] a case involving a citizen's speech rights as well as his religious liberty. Cantwell, a Jehovah's Witness, had been proselytizing in a largely Catholic neighborhood by, among other things, playing an anti-Catholic record, when he was arrested and charged with a breach of the peace. The Court had no difficulty on these facts in deciding that the free exercise of religion was a right so fundamental that the First Amendment's religion language must restrain the states as well as the federal government. The Court overturned Cantwell's conviction, ruling in effect that the state's interest in keeping the public peace did not outweigh Cantwell's right to proclaim and spread his religious beliefs. There can be little doubt that the strength of Cantwell's free exercise claim was augmented by the free speech interest with which it was inextricably bound.[19]

The Court continued to develop free exercise jurisprudence in a series of decisions following *Cantwell.* In these early cases, the Court implicitly employed a balancing approach, weighing the infringement on an individual's interests in being free of state interference against the burden that an exemption would place on the state's regulatory interests. In *West Virginia Board of Education v. Barnette,*[20] for example, the free exercise and speech interests of Jehovah's Witnesses (whose religion forbade them to worship graven images) prevailed over a state law mandating recital of the Pledge of Allegiance in public schools. In *Prince v. Massachusetts,*[21] however, the Court found that a state's child protection laws outweighed the free exercise and family autonomy interests asserted by a Jehovah's Witness who had been convicted of aiding her young ward to violate state law by selling religious leaflets on the public streets.

The issue of the applicability of the First Amendment's establishment language to the states did not reach the Court until after it had decided several cases under the free exercise provision. In these early free exercise cases, the Court had no occasion to consider in any depth the connections and interplay between the free exercise and establish-

17. 302 U.S. at 326-27.

18. 310 U.S. 296 (1940).

19. Justice Roberts' opinion for the Court made the connection expressly, noting that the Constitution declares "that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged." 310 U.S. at 307.

20. 319 U.S. 624 (1943).

21. 321 U.S. 158 (1944).

ment language of the First Amendment. Having proceeded for several years as though free exercise and establishment had no necessary connection with one another, the Court by 1947 was susceptible to the argument that the establishment provision represented its own independent set of values. When the question of the incorporation of the establishment provision reached the Court in that year, the stage was set for the Justices to adopt a controversial and ahistorical interpretation of that language.

Everson v. Board of Education[22] arose from the challenge by a New Jersey taxpayer to the state's practice of permitting parents of private school students (including students attending church-run schools) to be reimbursed for the costs of transportation on public buses to and from school. Today, *Everson* is chiefly remembered not for its holding that the transportation reimbursement program at issue was constitutionally valid, but for its wholehearted espousal of a particular view of the essential purpose of the Constitution's religion language. It was a view that Justice Frankfurter had advanced in a 1943 dissent, where he declined to join the Court's decision that a state may not tax the sale by Jehovah's Witnesses of religious literature. Explaining why he believed that the free exercise claim should not have been upheld in that case, Justice Frankfurter claimed that to exempt the proselytizers from taxation offended "the most important of all aspects of religious freedom in this country, namely, that of the separation of church and state."[23] Though the Court majority had been unwilling on the earlier occasion to permit separationism to govern its interpretation of the free exercise provision, it made it central to its establishment provision approach in *Everson.*

In so doing, the Court elevated the separation of church and state to the status of a constitutional end in itself. This historic move was as unreflective as it was fateful. The various opinion writers in *Everson* seemed unaware of the free exercise implications of their acceptance of separation as an independent constitutional value. As a matter of judicial craftsmanship, it is striking in retrospect to observe how little intellectual curiosity the members of the Court demonstrated in the challenge presented by the task of adapting, for application to the states, language that had long served to protect the states against the federal government. For the historical record is clear that when the religion language was first adopted it was designed to restrain the federal government from interfering with the variety of state-church ar-

22. 330 U.S. 1 (1947).

23. Murdock v. Pennsylvania, 319 U.S. 105, 140 (1943) (Frankfurter, J., dissenting).

rangements then in place.[24] Incorporation of this provision therefore required some thought about the purpose of the religious freedom language and its relation to the Fourteenth Amendment within a modern regulatory state. Akhil Amar, writing in the *Yale Law Journal,* has suggested that it was Justice Black's intense desire to advance the incorporation project that inclined him to "gloss over" this especially complex problem.[25] Whatever the motive, a fateful step was taken without offering reasons and justification. Moreover, by setting the interpretation of "establishment" on a different course from that of "free exercise," the Justices in *Everson* created an appearance of conflict between two provisions that history and text suggest were meant to work together in the service of religious liberty.[26]

Justice Black, writing for the Court, used language that ideological plaintiffs later seized upon to further a program of eliminating virtually all forms of governmental assistance to religion.[27] The establishment provision, he asserted, as though it were apodictic,

> means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect a "wall of separation between church and state."[28]

Commentators have since exposed the lack of foundation for Justice Black's novel theory of the original intent of the establishment provision.[29] But the introduction of Jefferson's "wall" metaphor into

---

24. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion,* 103 HARV. L. REV. 1409 (1990).

25. Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 YALE L.J. 1131, 1160 (1991).

26. For criticism of the tendency to treat the free exercise and establishment provisions in isolation from one another, see generally: Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673, 674-75 (1980); John H. Mansfield, *The Religion Clauses of the First Amendment and Philosophy of the Constitution,* 72 CAL. L. REV. 847, 848 (1984); McConnell, *supra* note 9, at 195. See *infra* Part IV for discussion of the Framers' intent.

27. For a discussion of the main groups that initiated, financed, or participated in Establishment Clause litigation, see NOONAN, *supra* note 11, at 374-75, and RICHARD E. MORGAN, DISABLING AMERICA: THE "RIGHTS INDUSTRY" IN OUR TIME 33-41 (1984).

28. Everson v. Board of Educ., 330 U.S. at 15-16 (citation omitted).

29. *See* ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES ch. 2 (1990); Michael W. McConnell, *Coercion: The Lost Element of Establishment,* 26 WM. & MARY L. REV. 933 (1986). *See also infra* notes 298-306 and accompanying text.

constitutional analysis was to have profound consequences.[30] Decades later, after attempts to derive principles from the metaphor had wrought considerable havoc in church-state law, Justice Rehnquist reviewed the historical record, summed up the findings of scholars, and commented:

> It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years. Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association [where the expression appeared] was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.[31]

Jefferson himself, it appears, acknowledged the propriety of a variety of governmental endorsements of religion at the state level, notwithstanding the views he expressed in the letter to the Danbury Baptists.[32] As for the rest of the Founders, their opinions regarding the proper role of religion in the new constitutional order were diverse. Some, like Jefferson, were generally unsympathetic to organized religion, while others, like John Adams, considered vital religions essential to the proper functioning of the polity.[33]

Justice Black's sketchy "history" in support of his separationist interpretation also included a reference to disestablishment in colonial Virginia.[34] Black neglected to mention, however, that church-state arrangements in the original thirteen states were as diverse as the views of the Founders, with Virginia representing but one model on a spectrum that ranged from disestablishment through official state establishment, with various cooperative arrangements in between.[35] Although the historical record resists simplistic characterization, it contains no support at all for the view that the establishment language commanded a complete separation between government and religion

30. The first reference to Jefferson's metaphor by the Supreme Court occurred in Reynolds v. United States, 98 U.S. 145, 164 (1879).

31. Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

32. Amar, *supra* note 25, at 1159; Richard F. Duncan, *Religious Civil Rights in Public High Schools: The Supreme Court Speaks on Equal Access*, 24 IND. L. REV. 111, 132-33 (1991).

33. ADAMS & EMMERICH, *supra* note 29, at ch. 2; *see also* NOONAN, *supra* note 11, at 93-126.

34. *See* Everson v. Board of Educ., 330 U.S. 1, 11-13 (1947).

35. NOONAN, *supra* note 11, at 127-67; Wallace v. Jaffree, 472 U.S. 38, 99 n.4 (1985) (Rehnquist, J., dissenting); *see also* SANFORD COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 14-15 (1902).

at the national level, not to mention the state level, to which the First Amendment did not even apply then. The leading champions of separationism as a good in itself were not the Founders, but later commentators whose vision of rights owed more to John Stuart Mill than to John Locke.[36]

As for the sweeping dicta in *Everson* that all government laws or expenditures that aid religion in any way are invalid, Justice Black himself admitted that it could not be taken literally. State court decisions, he observed, had shown "the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion."[37] To the dismay of dissenting Justices Jackson, Rutledge, Frankfurter, and Burton, Black's opinion for the majority in *Everson* drew that line so as to permit the bus transportation scheme in that case to survive. Black acknowledged the "possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State."[38] He likened the transportation reimbursement program, however, to services like fire and police protection which he deemed "indisputably marked off from the religious function" of the institutions they aided.[39] To deprive religious institutions of such services, he wrote,

> is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.[40]

Justices Jackson and Rutledge found it impossible to understand why Justice Black did not apply the separationist principles accepted in *Everson* to the facts before the Court. "[T]he undertones of the opinion, advocating complete and uncompromising separation of Church from State," Jackson wrote, "seem utterly discordant with its conclusion yielding support to their commingling in educational matters."[41] Justice Rutledge's dissent insisted that the purpose of the First Amendment's religion language was "to create a complete and

36. Regarding the advance of Millean understandings of rights in America, see MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE chs. 2-3 (1991).

37. *Everson*, 330 U.S. at 14.

38. 330 U.S. at 17.

39. 330 U.S. at 18.

40. 330 U.S. at 18.

41. 330 U.S. at 19 (Jackson, J., dissenting).

permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[42] Rutledge pointed a judicial finger, for the benefit of future plaintiffs, toward the areas that, in his view, were most in need of reform:

> [A]part from efforts to inject religious training or exercises and sectarian issues into the public schools, the only serious surviving threat to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands is through use of the taxing power to support religion, religious establishments, or establishments having a religious foundation whatever their form or special religious function.[43]

The Rutledge opinion in *Everson* affords an instructive glimpse of an influential assumption at the heart of much separationist thinking about the establishment language: the assumption that religion is or ought to be a "wholly private" matter. Rutledge took it as self-evident that "[t]he realm of religious training and belief remains, as the Amendment made it, the kingdom of the individual man and his God," and that "[i]t should be kept inviolably private."[44] This theme was to recur frequently in church-state opinions over the years. For many Justices, the only constitutionally cognizable religious experiences were those that implicated the solitary individual. A subtheme was that religious experience is separable from the rest of human life and activity.[45]

In sum, *Everson* committed the Court to a cluster of problematic positions. The only disagreement was on how vigorously the Court should pursue the separationist program. With little or no support from text, history, or tradition, the members of the *Everson* Court braided into the Religion Clause the notions that the establishment provision was meant to create a "wall of separation" between religion and the government, that it was to be broadly construed to prohibit all government aid to religion, and that government was required to be strictly neutral as between religion and nonreligion. The Court thus lent its prestige and sponsorship to a controversial secularizing program without even acknowledging what in hindsight seem like obvious and serious interpretive problems: What is a religion? What does it mean to "prohibit" religious exercise? Is there one Religion Clause or two? Does the establishment language embody a value in tension with that of free exercise, or is the ban on establishment of religion to be

42. 330 U.S. at 31-32 (Rutledge, J., dissenting).

43. 330 U.S. at 44.

44. 330 U.S. at 57-58.

45. *See infra* notes 193-94 and accompanying text.

interpreted so as to promote free exercise? Is language that was intended to protect state arrangements regarding religion from federal intervention a proper subject for "incorporation" at all?

Once the Court had given broad scope to the concept of establishment, it was inevitable that a host of "Establishment Clause" problems would be precipitated, especially as the size and reach of government expanded and the structure of American federalism changed. In the 1940s, state and local governments were already beginning to lose some of their autonomy. They would lose much more as Truman's Fair Deal and Johnson's Great Society succeeded Roosevelt's New Deal. As the apparatus of the regulatory state penetrated every American town and city, the occasions for government and religion to intersect multiplied. The separationist dogma of *Everson* seemed to require that where government advanced, religion must retreat.[46] Schools, especially, became frequent flash points of conflict as the Court elaborated and applied its notion that all government aid to religion constituted establishment.

The Court, in short, produced its broad view of the establishment language at just the historical moment when its application would become increasingly difficult. But in the first establishment case after *Everson* to reach the Court, the majority Justices continued to ignore many of the issues presented by the approach to which they had committed themselves. In *Illinois ex rel. McCollum v. Board of Education,*[47] the Court began to implement the separationist principles it had announced but failed to apply two years before in *Everson. McCollum* involved American ecumenism in its infancy in the form of a cooperative effort among members of the Jewish, Roman Catholic, and several Protestant communities in Champaign, Illinois, to facilitate the provision of religious education for children who were attending public schools. Such efforts across the country were prompted, no doubt, by social changes that had endowed the state's near-monopoly over primary and secondary education with new and enlarged significance. Young children were now spending most of their waking hours during the school year in environments structured and supervised by public employees. The traditional generic Protestantism of most American public schools had never been meant to serve as a substitute for moral and religious education. It was, in any event, decreasingly suited to the needs of religiously diverse student bodies. Protestants, Catholics,

46. Richard John Neuhaus, *A New Order of Religious Freedom,* FIRST THINGS (forthcoming 1992).

47. 333 U.S. 203 (1948).

and Jews thus began to explore strategies for providing religious education to public school students.

In 1940, the groups involved in the *McCollum* case formed a voluntary association called the Champaign Council on Religious Education, and secured permission from the local Board of Education to hold weekly classes in their respective religions on the premises of public schools. The classes, lasting from thirty to forty-five minutes, were taught in three separate groups by Protestant teachers, Catholic priests, and a Jewish rabbi. These instructors were paid by the Council, but were subject to the approval and supervision of the superintendent of schools. The classes were open to children in grades four to nine whose parents signed printed cards requesting that their children be permitted to attend. Students who did not take religious instruction were not released from school, but were required to leave the classrooms being used for that purpose and to pursue their studies elsewhere in the school building.[48]

For the majority, this was an easy case. Justice Black, again writing for the Court, used the separationist principles of *Everson* to strike down the program. In a short opinion, he concluded that "[t]his is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith."[49] The state in this case transgressed the principle of separation by helping "to provide pupils for their religious classes through use of the State's compulsory public school machinery."[50]

Justice Frankfurter's separate opinion, joined by Justices Jackson, Rutledge, and Burton, sounded two additional themes that were to play important roles in the Supreme Court's efforts to arrive at solutions to vexing church-state problems — the specter of sectarian strife and the need for fair treatment of members of numerically small religious groups and nonbelievers.[51] He alluded, first, to the threat that religious divisiveness might pose to the unique mission of America's public schools: "Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects."[52] Then, explaining why the optional character of the religion classes in *McCollum* did not save the program, he pointed out that children belonging to nonparticipating sects might

48. 333 U.S. at 207-09.

49. 333 U.S. at 210.

50. 333 U.S. at 212.

51. *See infra* notes 59-69, 87-88, 160-61, 175, 185-95 and accompanying text.

52. 333 U.S. at 216-17 (Frankfurter, J., separate opinion).

"have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents."[53]

Justice Jackson, though concurring, was critical of the majority's abstract, broad language, and of the regulatory character of its ruling. Cautioning against excessive zeal in applying the separationist interpretation, he observed, "for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity . . . and other faiths accepted by a large part of the world's peoples."[54] Belatedly, he raised concerns about the simple transposition of antiestablishment principles to the states. The courts, he advised, should accord citizens and local governments a measure of flexibility to deal appropriately with America's diverse conditions:

> To lay down a sweeping constitutional doctrine . . . apparently approved by the Court, applicable alike to all school boards . . . "to immediately adopt and enforce rules . . . prohibiting all instruction in and teaching of religious education in all public schools," is to decree a . . . rigid . . . standard for countless school boards representing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes.[55]

Only the lone dissenter, Justice Reed, had begun to worry about the implications of *Everson.* Reed suggested that the Court, by permitting the wall metaphor to serve as a substitute for a reasoning process, was shirking the judicial role. "A rule of law," he warned, "should not be drawn from a figure of speech."[56] The establishment provision, he insisted, did "not bar every friendly gesture between church and state. It is not an absolute prohibition against every conceivable situation where the two may work together, any more than the other provisions of the First Amendment — free speech, free press — are absolutes."[57] Reed noted, too, that Frankfurter's evocation of sectarian strife was inapposite to the facts of the case at hand, which involved grass-roots cooperation among the sects in an attempt to solve a common problem. The record suggested, he pointed out, that the program had operated in a way opposite to that feared by Frankfurter: "The testimony of the religious education teachers, the secular teachers . . . and the many children, mostly from Protestant families,

53. 333 U.S. at 227-28.

54. 333 U.S. at 236 (Jackson, J., concurring).

55. 333 U.S. at 237.

56. 333 U.S. at 247 (Reed, J., dissenting).

57. 333 U.S. at 255-56 (footnote omitted).

who either took or did not take religious education courses, is to the effect that religious education classes have fostered tolerance rather than intolerance."[58]

As we have mentioned, a byproduct of the case-by-case approach to incorporation was the development of two largely separate bodies of Religion Clause law. In what were characterized as establishment cases leading out from *Everson* and *McCollum,* the Court employed a bright-line separationist test; it continued to develop a balancing approach, however, in what were denominated "free exercise" cases. Once the Court had interpreted the establishment provision so broadly as to forbid, in principle, any governmental aid to religion, conflict with the mandate to accommodate free exercise was inevitable. With the extraconstitutional principle of separationism being treated as the dominant value in these early cases, it was further almost inevitable that free exercise would be narrowly construed to avoid conflict, for "accommodations" of religious belief and action, when viewed through separationist lenses, were hard to distinguish from impermissible assistance to religion.

The tension between the clauses vanished, however, where the rights concerned were those of nonbelievers. In such cases separationism and free exercise were mutually reinforcing. Thus, in *Torcaso v. Watkins,* Justice Black had no difficulty gathering unanimity for an opinion that ruled unconstitutional the Maryland Constitution's requirement of a declaration of belief in God as a qualification for any "office of profit or trust."[59] The state, he said, could not "pass laws or impose requirements which aid all religions as against non-believers," and could not favor religions based on a belief in God.[60]

But when accommodation *for* religion was sought, the Court narrowly construed free exercise and subordinated it to the value of nonestablishment. It was only by construing the free exercise provision as mainly protecting individual rights, largely ignoring its associational and institutional dimensions, that the Court was able to avoid the sharpest confrontations between the understanding of establishment advanced in *Everson* and the basic freedom protected by the First Amendment's Religion Clause. But in a school prayer case decided in 1962, Justice Potter Stewart called attention for the first time to the fundamental incompatibility of the Court's two lines of religion

58. 333 U.S. at 243 n.6 (quoting McCollum v. Board of Educ., 71 N.E.2d 161, 164 (Ill. 1947)).

59. 367 U.S. 488, 489 (1961).

60. 367 U.S. at 495.

cases. *Engel v. Vitale*[61] was the first challenge to prayer in the public schools to be decided by the Supreme Court. The prayer at issue was not the "Lord's Prayer," which had long been customary at the beginning of each day in the nation's schools, but rather a nondenominational prayer that the New York State Board of Regents commissioned for use in the public schools of that large and diverse state. The prayer read: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[62]

When the Union Free School District No. 9 in New Hyde Park, New York, introduced the prayer on the regents' recommendation, the parents of several children in that district's schools brought suit, claiming that the prayer violated the establishment provision of the First Amendment in that it breached "the constitutional wall of separation between Church and State."[63] The case was a simple one under the Court's establishment precedents. Justice Black, again writing for the Court, forcefully declared that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[64] The school district had clearly violated the Constitution's establishment ban since the "state prayer program officially establishe[d] the religious beliefs embodied in the Regents' prayer."[65]

What makes *Engel* interesting, however, is not its result, which could have been justified without resort to strict separationism,[66] but rather the astonishment that a newcomer to the Court, Potter Stewart, expressed at the analytical shortcomings of the majority's interpretive approach. The establishment label, it seemed plain to him, was being employed to cover up a major free exercise issue:

> I cannot see how an "official religion" is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation.
>
> . . . For we deal here not with the establishment of a state church, which would, of course, be constitutionally impermissible, but with whether school children who want to begin their day by joining in prayer must be prohibited from doing so.[67]

---

61. 370 U.S. 421 (1962).

62. 370 U.S. at 422.

63. 370 U.S. at 425.

64. 370 U.S. at 425.

65. 370 U.S. at 430.

66. *See infra* notes 104 and 259 and accompanying text.

67. 370 U.S. at 445 (Stewart, J., dissenting).

The Stewart dissent brought out into the open the problematic nature of any sharp distinction between establishment and free exercise cases. With virtually complete state control over primary and secondary education in an epoch when children spend less and less time with their parents and more and more time at school, the root-and-branch elimination of all traces of religion from public education unavoidably implicates the free exercise provision. At the same time, it mandates a state of affairs that, to many religious Americans, looks very much like establishment of a secular religion. This insight did not, of course, dictate a decision in favor of state-sponsored school prayer. Instead, it revealed the extreme complexity of the task of protecting religious liberty in a diverse society, a complexity the Court had hitherto largely succeeded in disguising from itself and others.

Justice Stewart was unimpressed with the majority's ritualistic evocation of religious strife of long ago: "What is relevant to the issue here is not the history of an established church in sixteenth century England or in eighteenth century America, but the history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our government."[68] With numerous examples, ranging from the inaugural addresses of presidents to official slogans and mottoes, he reminded his colleagues of how deeply religious meaning and content permeated American history and life.[69] Any attempt to understand the establishment language in a vacuum without taking account of this living reality was bound to be wooden and simplistic.

Stewart continued his critique of the Court's establishment doctrine along these lines in subsequent dissenting opinions, but his was a lonely voice on what was now the Warren Court. Stewart's colleagues were satisfied to continue to develop their Religion Clause jurisprudence under the aegis of *Everson.*

With hindsight, incorporation in the 1940s posed formidable legal-political challenges that should have called forth every ounce of energy, wit, technical skill, and legal imagination available to the Court. Yet it is hard to escape the impression in reading the decisions of that era that — regardless of outcomes — serious issues were overlooked, important claims and arguments were rather lightly dismissed, and practical implications for the lives of countless Americans were regularly ignored. The Court skipped carelessly over formidable problems of interpretation that required sustained attention to the language, his-

68. 370 U.S. at 446.

69. 370 U.S. at 446-49.

tory, and purposes of the original Constitution, the Bill of Rights, the Fourteenth Amendment, and the relation among them in the modern regulatory state. In lieu of embarking on that demanding process, *Everson* gave the Supreme Court's support to an approach to the religion language of the First Amendment in which the concept of establishment was broadened, treated as separate from, and actually placed on a collision course with the value it was meant to serve — the free exercise of religion.

Once the Court embarked without discussion on that path, it was almost impossible for it to avoid construing free exercise narrowly to prevent, so far as possible, accommodations of religious belief and action that might appear, under a broad concept of establishment, to constitute impermissible assistance to religion. The end result was an inversion of the First Amendment's religion language. A single coherent provision that on its face seemed to protect freedom of religion by forbidding Congress to establish religion or otherwise burden free exercise[70] became two "clauses" with free exercise regularly subordinated to a broad notion of nonestablishment. As time went on, forbidding governmental support of religion became the cardinal value served by the Court's decisions, and the free exercise of religion took a back seat. Language that had been placed at the beginning of the Bill of Rights to protect religion from government had been turned around to protect government from religion. This subjugation of religious freedom to separationism continued even as the Warren Court moved more broadly to increase the scope of freedoms protected by the Bill of Rights.

II. The Religion Clause in the Rights Revolution

Beginning in the mid- to late 1950s, there emerged a consistent voting bloc on the Supreme Court willing to develop and expand the constitutional protection of a broad range of political and civil rights. Over the next three decades, the Court, exercising a vigorous form of judicial review in selected areas, announced sweeping new doctrines that extended the scope of freedom of speech, freedom of the press, the rights of the criminally accused, due process protection of certain statutory entitlements, privacy rights, and equal protection. At first, it seemed that the rights revolution might yield heightened protection for religious freedom. For, in the 1963 case *Sherbert v. Verner*,[71] the Warren Court substituted a "compelling interest" test for the less rig-

70. I Anson Phelps Stokes, Church and State in the United States 555-56 (1950).
71. 374 U.S. 398 (1963).

orous balancing approaches that it had been employing in free exercise cases since the 1940s. But in *School District of Abington Township v. Schempp,*[72] an establishment case decided on the same day as *Sherbert,* the Court signaled that separationism would continue to drive its approach to establishment cases, taking priority over other aspects of religious freedom. As time went on, it became apparent that the Warren Court would not merely follow the separationist principles laid down in *Everson,* but would give them a new antimajoritarian thrust. Coalitions of Justices preoccupied with protecting individuals and selected minorities from "majoritarian" legislation regularly conscripted the Religion Clause in the service of that agenda. Separationism and antimajoritarianism, rather than religious freedom, became central to the Warren Court's approach in Religion Clause cases.

The marriage of these themes was effected in *Sherbert* and *Schempp,* but not without notice and adverse comment by Justices Stewart and Goldberg, relative newcomers to the Court to whom many of the premises on which Religion Clause interpretation had proceeded seemed shaky. In *Sherbert,* the new, higher standard of review for free exercise cases was applied to require that unemployment benefits be provided to a Seventh Day Adventist who was discharged for refusing to work on her Sabbath day.[73] To require accommodation of religion in that way did not violate the Establishment Clause, Justice Brennan argued, because it did "not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall."[74] Justice Stewart, stating that "no liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause," concurred.[75] But he could not accept Justice Brennan's characterization of the purpose of the establishment provision or the implicit subordination of free exercise. The Court's excessively broad interpretation of establishment had led, he pointed out, to "a double-barreled dilemma, which in all candor . . . the Court's opinion ha[d] not succeeded in papering over."[76] Where free exercise was concerned, the Court had at times "shown . . . a distressing insensitivity to the appropriate demands of this constitutional guarantee."[77] In the establishment area, the Court's approach had

72. 374 U.S. 203 (1963).

73. 374 U.S. at 406-07.

74. 374 U.S. at 409 (citation omitted).

75. 374 U.S. at 413 (Stewart, J., concurring).

76. 374 U.S. at 413.

77. 374 U.S. at 414.

"on occasion . . . been not only insensitive, but positively wooden, and . . . the Court ha[d] accorded to the Establishment Clause a meaning which neither the words, the history, nor the intention of the authors of that specific constitutional provision even remotely suggests."[78]

Focusing on the problem that the *Everson* and *McCollum* courts had studiously ignored, Justice Stewart pointed out that the strict separationist approach inaugurated in those cases had created many "situations where legitimate claims under the Free Exercise Clause will run into head-on collision with the Court's insensitive and sterile construction of the Establishment Clause."[79] If the Court took its own construction of the establishment language seriously ("the Establishment Clause bespeaks 'a government . . . stripped of all power . . . to support, or otherwise to assist any or all religions' "[80]), it would have had to conclude in *Sherbert* that South Carolina was constitutionally compelled to refuse the Seventh Day Adventist unemployment benefits.

To Justice Stewart it seemed plain that the source of the difficulty was a "mechanistic" concept of the establishment provision that he labeled as historically and constitutionally wrong.[81] His concurring opinion in *Sherbert* was an indictment of the slapdash manner in which the Court had approached the problems of incorporation in the 1940s, and a reminder that the core guarantee of the Religion Clause, religious liberty, should not be applied or withheld depending on majority or minority status.

> I think the process of constitutional decision in the area of the relationships between government and religion demands considerably more than the invocation of broadbrushed rhetoric . . . . And I think that the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief and disbelief. In short, I think our Constitution commands the positive protection by government of religious freedom — not only for a minority, however small — not only for the majority, however large — but for each of us.[82]

Acknowledging that the flawed "decisions are on the books," Stewart nevertheless insisted that stare decisis did not absolve the Court from its "duty to face up to the dilemma posed by the conflict" these decisions had created.[83]

78. 374 U.S. at 414.

79. 374 U.S. at 414.

80. 374 U.S. at 398 (quoting Everson v. Board of Educ., 330 U.S. 1, 11 (1947)).

81. 374 U.S. at 415.

82. 374 U.S. at 415-16.

83. 374 U.S. at 414, 416.

> It is a duty . . . which we owe to the people, the States, and the Nation, and a duty which we owe to ourselves. For so long as the resounding but fallacious fundamentalist rhetoric of some of our Establishment Clause opinions remains on our books, to be disregarded at will . . . or to be undiscriminatingly invoked . . . so long will the possibility of consistent and perceptive decision in this most difficult and delicate area of constitutional law be impeded and impaired. And so long, I fear, will the guarantee of true religious freedom in our pluralistic society be uncertain and insecure.[84]

The establishment decision announced on the same day as *Sherbert* made it plain that Justice Stewart's call for attention to the problem of the relation between the two parts of the religion guarantee had fallen on deaf ears. In *School District of Abington Township v. Schempp,*[85] the Court, with only Stewart dissenting, struck down a Pennsylvania law it construed as requiring the reading and recitation of biblical passages and Christian prayers in the state's public school classrooms. Perhaps the fact that much of Justice Stewart's criticism of mechanical separationism was associated with his dissents from school prayer decisions helps to explain why his insights on the interpretive problems were ignored. But with hindsight, the *Schempp* case is less remarkable for its result, which followed from *Engel v. Vitale,*[86] than for its decisive affirmation of the separationist approach laid down in *Everson* and its characterization of free exercise as an *individual* right.

In those respects, *Schempp* charted the basic course that the Warren and Burger Courts were to follow in the church-state area during the period of the rights revolution. Justice Clark's majority opinion, citing *Everson* for the proposition that the establishment language commands the complete separation of church and state,[87] said the purpose of the free exercise provision was "to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority."[88] In the cases it chose to regard as involving establishment, the Court endeavored to keep government apart from, and "neutral" towards, religious activity. In the free exercise cases, the Court concentrated on protecting the religious liberty *of the individual.* A broad interpretation of establishment backed up by a bright-line test discouraged legislatures and administrators from accommodating or cooperating with religion in any way. An individualistic construction of free exercise backed up by a "compelling interest" test discouraged govern-

84. 374 U.S. at 416-17.
85. 374 U.S. 203 (1963).
86. 370 U.S. 421 (1962).
87. 374 U.S. at 216-17.
88. 374 U.S. at 223.

ment from interfering with the religious rights of solitary individuals, but ignored the associational aspects of free exercise.

To Justice Goldberg, who uneasily concurred in *Schempp,* it seemed plain that the core of the First Amendment's religion language was not separationism for its own sake, but freedom of religion.[89] He agreed that the attitude of government toward religion must be one of neutrality, but he saw that there were several ways in which that elusive concept could produce outcomes that were far from neutral. He wrote:

> [U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.[90]

Justice Stewart, in dissent, continued his denunciation of the Court's simplistic approach to the intricate interpretive problems that had been brushed aside in the incorporation process:

> It is . . . a fallacious oversimplification to regard [the religion language] as establishing a single constitutional standard of "separation of church and state," which can be mechanically applied in every case to delineate the required boundaries between government and religion. We err in the first place if we do not recognize, as a matter of history and as a matter of the imperatives of our free society, that religion and government must necessarily interact in countless ways. Secondly, the fact is that while in many contexts the Establishment Clause and the Free Exercise Clause fully complement each other, there are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause.[91]

Echoing Justice Reed's early warning in *McCollum* about basing a rule of law on a figure of speech, Justice Stewart commented, "[T]he two relevant clauses of the First Amendment cannot accurately be reflected in a sterile metaphor which by its very nature may distort rather than illumine the problems involved in a particular case."[92]

To illustrate the conflict the Court's misreading had produced between the two clauses, Stewart offered the example of "a lonely soldier stationed at some faraway outpost [who] could surely complain that a government which did *not* provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his reli-

89. 374 U.S. at 306 (Goldberg, J., concurring).

90. 374 U.S. at 306.

91. 374 U.S. at 308-309 (Stewart, J., dissenting).

92. 374 U.S. at 309.

gion."[93] Yet, as the Court had construed establishment, the provision of a military chaplain could be seen as unconstitutional government support of religion. The best way to approach the problem, Stewart suggested, was to begin with the historical context of the First Amendment. That amendment, he reminded the Court, was by its terms a limitation on the national government. The establishment provision was "primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments."[94] A dilemma was thus created when the establishment provision was held to have been incorporated via the Due Process Clause of the Fourteenth Amendment. For as Stewart noted, language that had been "designed to leave the States free to go their own way" had now "become a restriction upon their autonomy."[95]

What Justice Stewart found deplorable was that the Court had brought a crude "mechanistic" approach to a task that required all the resources of the judicial craft.[96] Initially, at least, the problem of the relation between the two provisions of the Religion Clause, compounded by the difficulty of determining how the establishment language was to apply to the states, ought to have been approached in the light of the concerns that had led to the adoption of the First and Fourteenth Amendments. The historical evidence left Justice Stewart with little doubt that the "central value embodied in the First Amendment — and, more particularly, in the guarantee of 'liberty' contained in the Fourteenth — is the safeguarding of an individual's right to free exercise of his religion."[97]

Using the *Schempp* dispute as an example, Justice Stewart explained that recognizing religious freedom as the central value served by both "clauses" would not make the religion cases easy to decide. What rendered the school prayer cases particularly agonizing was precisely that conflicting free exercise claims were involved — those of parents and children who wanted religion to be part of the school day and those of parents and children who were offended by the practice of public prayer or scripture reading. The argument that the former should be content to relegate religion to after-school hours did not wash, in Stewart's view.

> For a compulsory state educational system so structures a child's life

93. 374 U.S. at 309.
94. 374 U.S. at 309-10.
95. 374 U.S. at 310.
96. 374 U.S. at 310.
97. 374 U.S. at 312.

> that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, . . . a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at the least, a government support of the beliefs of those who think that religious exercises should be conducted only in private.[98]

As Justice Stewart construed the statute involved in *Schempp,* it did not mandate morning religious exercises in every school. Rather, it gave permission to local school committees to decide whether or not to conduct such exercises, and to arrange their variety and content in a manner appropriate for local community conditions. As for those students who did not wish to participate, he emphasized that it is the duty of government to refrain "from so structuring the school environment as to put any kind of pressure on a child to participate in those exercises."[99] But government was not required, he believed, to insulate nonparticipants "from any awareness that some of their fellows may want to open the school day with prayer, or of the fact that there exist in our pluralistic society differences of religious belief."[100]

> In the absence of coercion upon those who do not wish to participate — because they hold less strong beliefs, other beliefs, or no beliefs at all — such provisions cannot . . . be held to represent the type of support of religion barred by the Establishment Clause. For the only support which such rules provide for religion is the withholding of state hostility — a simple acknowledgment on the part of secular authorities that the Constitution does not require extirpation of all expression of religious belief.[101]

The challenge to government in a religiously diverse, liberal, democratic society, in Stewart's view, was not to dissolve or deny confessional differences by eradicating every trace of religion from the public schools, but to find a fair way to accommodate them. The challenge for the public schools, had Stewart's view prevailed, would have been to try to teach tolerance, and to attempt to go beyond tolerance to understanding and celebrating the rich diversity, as well as the common humanity, of our "incorrigibly religious,"[102] heterogeneous, population. As Justice Stewart summed up his vision of religious freedom: "What our Constitution indispensably protects is the freedom of each of us, be he Jew or Agnostic, Christian or Atheist, Bud-

98. 374 U.S. at 313.

99. 374 U.S. at 316.

100. 374 U.S. at 316-17.

101. 374 U.S. at 316.

102. The expression is that of Richard John Neuhaus. RICHARD J. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 105 (1984).

dhist or Freethinker, to believe or disbelieve, to worship or not worship, to pray or keep silent, according to his own conscience, uncoerced and unrestrained by government."[103] What Justice Stewart did not sufficiently appreciate is that there were other less coercive ways to accommodate religious expression in public settings than through government-sponsored prayer.[104] In theory, the school prayer cases should have drawn attention to John Stuart Mill's forgotten argument that education in a democracy is simply too important to be left to the government.[105] But the ideology of the common school was still too strong and the condition of public education had not yet sufficiently deteriorated for the government's near-monopoly on education to come into question.

Over the next several years, on a Court composed of Chief Justice Warren and Justices Black, Fortas, Brennan, Douglas, Clark (succeeded by Marshall), White, and Harlan, Justice Stewart's opinions played little part in the development of Religion Clause law.[106] The individual rights/separationist/antimajoritarian approach prevailed even through the Burger era, though it did not command a majority in every case. Under Chief Justice Burger's leadership, a somewhat less hard-edged version of separationism began to emerge. In a 1970 test case challenging New York City's practice of granting property tax exemptions to religious organizations for religious properties used solely for worship, the Court declined to carry separationist principles to the extreme of striking down this traditional form of accommodation. Burger, new to the Court, took the occasion of *Walz v. Tax Commission*[107] to offer his own critique of the Court's precedents in the religion area, and to try to chart a more moderate approach. "The considerable internal inconsistency in the opinions of the Court," he wrote, "derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to

---

103. *Schempp*, 374 U.S. at 319-20.

104. *See, e.g.*, Board of Educ. v. Mergens, 110 S. Ct. 2356 (1990) (upholding application of Equal Access Act to require a public school to permit voluntary student religious group meeting on school premises after hours on same basis as other student groups); *see also infra* note 259.

105. JOHN STUART MILL, ON LIBERTY (Elizabeth Rapaport ed., Hackett 1978). Mill warned that

> [a] general state education is a mere contrivance for molding people to be exactly like one another; and as the mold in which it casts them is that which pleases the predominant power in government, . . . in proportion as it is efficient and successful, it establishes a despotism over the mind, leading by natural tendency to one over the body.

Id. at 129.

106. *See generally* Rodney K. Smith, *Justice Potter Stewart: A Contemporary Jurist's View of Religious Liberty*, 59 N.D. L. REV. 183 (1983).

107. 397 U.S. 664 (1970).

the particular cases but have limited meaning as general principles."[108] He pointed out, as Justice Stewart had done in *Schempp,* that "[n]o perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts — one that seeks to mark boundaries to avoid excessive entanglement."[109]

Departing from the acontextual and ahistorical approach the Court had taken in religion cases generally, he pointed out that tax exemptions for religious property are the product of an "unbroken" history that "covers our entire national existence."[110] Such exemptions, customarily accorded by the colonists, and continued by Congress and state legislatures from the Founding to the present day, had not "le[d] to an established church or religion," but had "operated affirmatively to help guarantee the free exercise of all forms of religious belief."[111]

Stating that a more compelling case would have to be made to dislodge a practice so "deeply embedded" and widely accepted in our culture, Chief Justice Burger declined the taxpayer's invitation to second guess the judgment of New York (and other states) in the matter.[112] The legislature had determined "that certain entities that exist in a harmonious relationship to the community at large, and that foster its 'moral or mental improvement,' should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes."[113] Religious groups, the Chief Justice emphasized, had not been singled out by New York for this preferential tax treatment. Instead, the state had "granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups."[114] Burger described the exemption as flowing from New York's "affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest."[115] He expressly declined to justify the tax exemption on the basis of "the social welfare services or 'good works' that some churches perform for parishioners and

108. 397 U.S. at 668.
109. 397 U.S. at 670.
110. 397 U.S. at 678.
111. 397 U.S. at 678.
112. 397 U.S. at 676-78.
113. 397 U.S. at 672.
114. 397 U.S. at 673.
115. 397 U.S. at 673.

others — family counseling, aid to the elderly and the infirm, and to children," for this "would introduce an element of governmental evaluation . . . as to the worth of particular social welfare programs, thus producing a kind of continuing . . . relationship which the policy of neutrality seeks to minimize."[116]

The Chief Justice's opinion in *Walz* was of a piece with other Burger opinions solicitous of the ability of communities and intermediate groups to set the conditions for their own flourishing and development,[117] and with Stewart's view of the First Amendment as establishing a positive liberty.[118] The tax exemption flowed, as Burger saw it, from a considered legislative judgment that the state would prefer not to burden certain groups, religions among them, because the flourishing of these groups was judged to be in the public interest. They were deemed to be valuable in themselves, and not simply because they relieved the government of the burden of supplying certain social services. The long history of the practice of exempting certain kinds of property from taxation, he concluded, provided ample evidence that the exemption had not served as the toehold for an establishment of an official religion in New York.[119]

The *Walz* opinion, in retrospect, is noteworthy as one of the rare acknowledgments by a Court majority that (1) arrangements claimed to be violations of establishment principles may in fact be key underpinnings of free exercise, and (2) free exercise has associational and institutional, as well as individual, dimensions.[120] These two aspects of religious freedom had been largely ignored in the Court's earlier free exercise opinions, while the broad establishment characterization effectively obscured the free exercise implications of those cases. What had lapsed, in the long period between the Founding and incorpora-

116. 397 U.S. at 674.

117. *E.g.*, Miller v. California, 413 U.S. 15, 33 (1973) ("People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity."); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57-58 (1973) (legitimate state interests in controlling commercial obscenity "include the interest of the public in the quality of life and the total community environment"); Wisconsin v. Yoder, 406 U.S. 205, 235 (1972) (protecting the traditional "way of life and mode of education" of Old Order Amish).

118. Sherbert v. Verner, 374 U.S. 398, 415-16 (1963) (Stewart, J., concurring).

119. 397 U.S. at 678.

120. Any distinction between individual and associational freedom in the religion area is difficult to maintain. Michael Sandel has persuasively argued that the Court's long practice of treating religion as the product of individual choice, and of regarding religious freedom as in the service of individual autonomy, leaves out of consideration the beliefs and practices of the vast numbers of religious Americans to whom the existence of a worshipping community is essential to religious experience. Michael J. Sandel, *Freedom of Conscience or Freedom of Choice?, in* ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY 74, 87 (James D. Hunter & Os Guinness eds., 1990) [hereinafter ARTICLES OF FAITH].

tion, was the understanding that the Bill of Rights protects certain social structures as well as individuals — churches in the First Amendment, community militia in the Second, and juries in the Sixth and Seventh.[121] *Walz* thus opened the door, not only to a milder version of separationism, but to a broader, more authentic, concept of free exercise.

Justice Brennan, in his concurrence, attempted to limit the damage to separationist principles. There were only "two basic secular purposes for granting real property tax exemptions to religious organizations," he wrote.[122] The first was the social welfare purpose that Chief Justice Burger's majority opinion explicitly rejected. The second was the promotion of pluralism.

> Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society. . . . To this end, New York extends its exemptions not only to religious and social service organizations but also to scientific, literary, bar, library, patriotic, and historical groups, and generally to institutions "organized exclusively for the moral or mental improvement of men and women."[123]
>
> . . . .
>
> . . . It is true that each church contributes to the pluralism of our society through its purely religious activities, but the state encourages these activities not because it champions religion *per se* but because it values religion among a variety of private, nonprofit enterprises that contribute to the diversity of the Nation.[124]

Straining to keep the *Walz* holding within the narrowest possible confines, Justice Brennan concluded that the exemption was valid only because it did not single out religion for special treatment, and because it served the secular purposes of providing social services and fostering diversity.

A year after the *Walz* decision, Chief Justice Burger attempted to extricate the Court from the sorts of difficulties and inconsistencies that in his view had marred establishment jurisprudence. Writing for the Court in *Lemon v. Kurtzman,* he expanded on the critique he had begun in *Walz* of the absolutist conception of separation.[125] The "line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relation-

121. *See infra* notes 316-20 and accompanying text.

122. 397 U.S. at 687 (Brennan, J., concurring).

123. 397 U.S. at 689 (quoting N.Y. REAL PROP. TAX § 420, subd. 1).

124. 397 U.S. at 693.

125. 403 U.S. 602 (1971).

ship."[126] To replace the "wall" metaphor with what he believed to be a more workable approach, he drew on prior cases, including his own opinion in *Walz,* to devise a three-part test for determining when a particular governmental action would pass muster under the establishment language. The test requires a challenged governmental action to cross each of three hurdles: (1) it must have a secular purpose, (2) its principal or primary effect must neither advance nor inhibit religion, and (3) it must not foster excessive government entanglement with religion.[127]

In the *Lemon* case itself, the entanglement prong proved fatal for the two statutory schemes before the Court: one reimbursing nonpublic elementary and secondary schools for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects; the other directly providing teachers of secular subjects in nonpublic elementary schools with a supplement of fifteen percent of their annual salary. Both programs, according to Chief Justice Burger, impermissibly entangled the government with religion. For to be certain that public funds were in fact being used for secular purposes, there would have to be a degree of "surveillance" that would run afoul of the new test.[128]

The *Lemon* test did represent a more realistic version of the separationist approach, but it did not deviate from the main lines laid down in *Everson* and *McCollum.* As Justice White pointed out in his partial dissent, the Court continued to ignore the fact that the establishment provision "coexists in the First Amendment with the Free Exercise Clause and the latter is surely relevant in [school] cases such as these."[129] Moreover, Burger's concern about the disorderly state of Religion Clause law did not incline him to reexamine its foundations or to question its implicit assumptions.

It soon became apparent that the *Lemon* test would not succeed in introducing consistency into the Court's pattern of decisions, for it proved extraordinarily malleable and was invoked in support of highly divergent results. By 1973, the Chief Justice found himself dissenting from a majority opinion by Justice Powell, applying the *Lemon* test to strike down New York's program of tuition grants and tax credits to parents whose children attended religious schools.[130] A Court majority's expansive understanding of what it means to advance religion, or

126. 403 U.S. at 614.

127. 403 U.S. at 612-13.

128. 403 U.S. at 619, 621.

129. 403 U.S. at 665.

130. Committee on Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

what constitutes excessive entanglement between church and state, continued, for the next decade, to signal that a formidable gauntlet awaited legislative and local experiments with creative use of nongovernmental agencies to deliver educational and other social services.

Despite his unwillingness to break with separationism as the driving force in establishment cases, Chief Justice Burger did garner a majority for an opinion manifesting an unprecedented judicial sensitivity to the associational dimension of religious liberty in a free exercise case, *Wisconsin v. Yoder,*[131] decided the year after the *Lemon* test was announced. The case arose when certain members of Old Order Amish religious communities were convicted of violating a Wisconsin law that required parents to send their children to school until the age of sixteen. A stark conflict was presented between the state's undisputedly strong interest in providing for the education and development of all its citizens and the Amish parents' claim that "their children's attendance at high school, public or private [beyond the age of fourteen], was contrary to the Amish religion and way of life" and would endanger their and their children's salvation.[132]

What is especially noteworthy about Chief Justice Burger's opinion for the Court in support of the position of the Amish parents is that it adopted a broader view of free exercise and manifested a greater degree of interest in the record than had been characteristic in religion cases up to that time. The Chief Justice described at length the nature of the interest of the Amish groups in receiving an exemption from the state requirement. The Amish rejected high school for their children because it exposed them to " 'worldly' influence in conflict with their beliefs."[133] In high school, the Amish believed, their children would be taught to value intellectual and scientific accomplishment, self-distinction, competitiveness, and worldly success. They preferred that their children be socialized into a community based on "informal learning-through-doing; a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society."[134]

Socialization of the Amish children in the high schools instead of home education took them

> away from their community, physically and emotionally, during the crucial and formative adolescent period of life. During this period, the chil-

131. 406 U.S. 205 (1972).

132. 406 U.S. at 209.

133. 406 U.S. at 211.

134. 406 U.S. at 211.

> dren must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. . . . [T]he Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism. In short, high school attendance with teachers who are not of the Amish faith . . . interposes a serious barrier to the integration of the Amish child into the Amish religious community.[135]

Meticulous record-building work at the trial level by lawyers for the Amish appears to have helped convince the Chief Justice that nothing less than the perpetuation of the Amish way of life was at stake. He noted that an expert on the Amish had testified that high school would not only inflict "great psychological harm to Amish children, because of the conflicts it would produce, but would also . . . ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today."[136] The Amish free exercise claim, according to the Chief Justice, was an attempt to find shelter from modern society's "hydraulic insistence on conformity to majoritarian standards."[137] The Wisconsin law presented "a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region."[138]

Having characterized the interest of the Amish in gaining an exemption from the state's compulsory education laws as a strong one, the Chief Justice turned to the state's interest in refusing to grant them an exemption. Citing *Sherbert v. Verner,* he wrote that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[139] The state's compulsory education policy was an important one, he began, motivated by the public interest in producing self-reliant and productive citizens. But as applied to the Amish, he found it inapposite.

> Whatever their idiosyncracies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional "mainstream." Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms.[140]

Since Wisconsin had presented the Court with no "strong" evidence to

135. 406 U.S. at 211-12.

136. 406 U.S. at 212.

137. 406 U.S. at 217.

138. 406 U.S. at 218.

139. 406 U.S. at 215 (citing, inter alia, Sherbert v. Verner, 374 U.S. 398 (1963)).

140. 406 U.S. at 222.

the contrary, Chief Justice Burger declined to accept the state's contention that uneducated Amish children would become "burdens on society should they determine to leave the Amish faith."[141] He went on to observe that the "independence and successful social functioning of the Amish community for a period approaching almost three centuries and more than 200 years in this country" rendered the state's assertion that one or two more years of schooling were necessary "at best . . . speculative."[142] Burger concluded by emphasizing that the case involved the "fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children."[143]

What makes the *Yoder* opinion a landmark in free exercise law is not its bare result, but the careful attention accorded by Chief Justice Burger to the facts, and what one might call his holistic or "ecological" understanding of what was at stake in the case. Much more was at issue, he saw, than the immediate disagreement over how individual school children would spend their day. The retention of the ability of the Amish community to set conditions for its own long-term perpetuation was the real heart of the respondents' claim. The Court's willingness to accord constitutional standing to that aspect of free exercise represented a significant, if fleeting, recognition that religious experience is not always a matter solely involving "the individual man and his God."[144] *Yoder's* implicit acknowledgment that the religious experience often cannot be separated from the fate of a community — that it may bind the present with the past and the future and play an important role in shaping the character of its members — was an opening to a more capacious approach to free exercise. It stands in marked contrast with the cramped vision of free exercise that had played havoc with the Court's understanding of both the establishment and free exercise provisions of the First Amendment since the 1940s.

As in *Cantwell v. Connecticut,*[145] the free exercise rights in *Yoder* received a significant boost from their close association with other important interests with constitutional status, in this case family and associational rights. The fact that the associational dimension of free exercise involved in *Yoder* was that of a "quaint" minority religion probably helped the Chief Justice to persuade all but one of his colleagues on that occasion. The Chief Justice himself stressed the nar-

141. 406 U.S. at 225.

142. 406 U.S. at 226-27.

143. 406 U.S. at 232.

144. *See* Everson v. Board of Educ., 330 U.S. 1, 57-58 (1947) (Rutledge, J., dissenting).

145. 310 U.S. 296 (1940). *See supra* notes 18-19 and accompanying text.

rowness of the holding in this respect, emphasizing that the Amish are not a group with a "recently discovered" process for educating children, and that "few other religious groups or sects could make" such a "convincing showing" as to outweigh the powerful state interest involved in compulsory education.[146] Only Justice Douglas dissented, and then only in part, as to those Amish children who had not expressed a preference in the matter.[147]

The narrowness of *Yoder* was reemphasized eleven years later in *Bob Jones University v. United States,*[148] where the Court in a unanimous opinion[149] (written by Chief Justice Burger) rejected the free exercise claim of a private university stripped of its tax exempt status by the federal government because of its religiously motivated policies against interracial dating. In no uncertain terms, the Chief Justice made it clear that the religion claims would have to bow to the strong governmental interest relating to one of the nation's most serious social problems. "Whatever may be the rationale for such private schools' policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy."[150] The governmental interest in eradicating racial discrimination in education prevailed, he said, over any free exercise interests the school might be able to demonstrate.[151]

Given the expansive approach to personal liberties the Warren and Burger courts adopted, one might have expected free exercise, at least in the narrower, individual sense, to have flourished under the *Sherbert* compelling interest test and to have benefited from the increased protection accorded to individual rights generally by the Court in the 1960s and 1970s. But that was not the case. For, even during the rights revolution, except in *Yoder* and in the unemployment compensation cases, free exercise values were regularly subordinated by the courts to governmental interests.[152]

---

146. 406 U.S. at 235, 236.

147. Stating that "[r]eligion is an individual experience," Douglas wrote that students have the right "to be masters of their own destiny" and that the Court should not assist parents in barring their children "forever . . . from entry into the new and amazing world of diversity that we have today." 406 U.S. at 243, 245.

148. 461 U.S. 574 (1983).

149. Justice Powell wrote a concurring opinion but joined the part of the Court's opinion dealing with the free exercise claim. 461 U.S. at 606 (Powell, J., concurring). Justice Rehnquist dissented on other grounds, but agreed that a denial of tax exempt status "would not infringe on petitioners' First Amendment rights." 461 U.S. at 622 n.3 (Rehnquist, J., dissenting).

150. 461 U.S. at 595.

151. 461 U.S. at 603-04.

152. *See generally* Douglas Laycock, *The Remnants of Free Exercise,* 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision,* 57 U. CHI. L. REV. 1109 (1990). *Sherbert*'s very existence, however, may have served to shelter free exercise by

Nowhere have the deleterious effects of the Court's excessively narrow view of free exercise and obsessively separationist interpretation of establishment been more apparent than in the cases involving schools. In a judicial pincer movement, one line of decisions leading out from *McCollum*[153] through *Engel v. Vitale*[154] requires the public schools to be rigorously secular, while another has struck down most forms of assistance to parents who fear for their children's welfare in educational systems that are often actively promoting values profoundly at odds with the family's religious convictions.[155] Despite the Court's willingness to give establishment an expansive interpretation, it has never acknowledged or come to terms with Justice Stewart's point that rigorous separationism is itself a kind of establishment because of the degree to which a compulsory state education system structures a child's life.[156] The net result has been that a crucial aspect of religious freedom remains unavailable to those families that are not wealthy enough to afford private education after paying their local taxes to support public schools. Nor is private education an entirely safe harbor from excessively intrusive and homogenizing regulation.

In a school case decided in 1985, Justice Brennan took the separationist *Lemon* test to such extremes that he may have hastened its eventual downfall. In *Aguilar v. Felton,*[157] the Court struck down a Great Society program that had been designed to provide federal aid to local agencies to assist educationally deprived children from low-income families. The New York City program involved in *Aguilar* had for nineteen years furnished public school teachers who provided remedial services and instruction to special needs children from the city's poorest neighborhoods. In the 1980s, six taxpayers attacked this longstanding and successful program as a violation of the establishment provision because it made these services available in private religious schools as well as in public schools. In the school year 1981-1982, 13.2% of the students eligible to be aided by the program were enrolled in private schools. Of that group, 84% were in Roman Catholic schools and 8% in Hebrew schools.

---

signaling to legislators and other government officials that religious exemptions from certain laws would be required. As to this deterrent effect, see text accompanying note 266 *infra.*

153. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1943); *see supra* text accompanying notes 47-58.

154. 370 U.S. 421 (1962).

155. The cases are collected in Justice Rehnquist's dissent in Wallace v. Jaffree, 472 U.S. 38, 110-12 (1985).

156. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 313 (1963) (Stewart, J., dissenting).

157. 473 U.S. 402 (1985).

Under the program in these religious schools, regular employees of the public schools who had volunteered to teach in the nonpublic schools provided instruction in remedial reading, remedial mathematics, and English as a second language. The city's Bureau of Nonpublic School Reimbursement made the teacher assignments, and the instructors were supervised by field personnel who tried to pay at least one unannounced visit per month. The supervisors of the field personnel also paid occasional unannounced visits to the classes. The city employees working in the religious schools were under instructions to avoid involvement with religious activities at the schools, to bar religious materials from their classrooms, to select the students themselves, to minimize contact with private school personnel, and to ensure that the parochial school administrators removed all religious symbols from the classrooms used by the public school personnel.[158]

On those facts, the Court, by a five-to-four majority, found that the program impermissibly entangled the state with religion. Justice Brennan's opinion for the Court gave several reasons for finding the program constitutionally infirm within the *Lemon* framework. "When the state becomes enmeshed with a given denomination in matters of religious significance," he warned, "the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular."[159] In addition, the religious freedom of adherents of the denomination is jeopardized by the governmental intrusion into sacred matters.

After discussing the Court's previous religion and public education decisions, Justice Brennan concluded that because of the "pervasively sectarian environment" of the schools and because teachers provided the assistance, the New York program would require permanent and extensive state supervision. "We have long recognized that underlying the Establishment Clause is 'the objective . . . to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other.' "[160] In this case, he wrote, intrusion by the state was unavoidable:

[T]he detailed monitoring and close administrative contact required to

158. 473 U.S. at 404-07. The Court's appreciation of the issues in *Aguilar* may have been colored by the fact that *Aguilar*'s companion case, School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985), raised more serious establishment questions. One of the programs at issue in *Grand Rapids*, unlike in *Aguilar*, involved the use of public funds to pay full-time employees of religious schools to teach secular subjects under the supervision of religious school administrators. *Grand Rapids*, 473 U.S. at 376-77.

159. 473 U.S. at 409-10.

160. 473 U.S. at 413 (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)).

> maintain New York City's Title I program can only produce "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." [quoting *Walz v. Tax Commission*] The numerous judgments that must be made by agents of the city concern matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations. As government agents must make these judgments, the dangers of political divisiveness along religious lines increase. At the same time "[t]he picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined specter of governmental 'secularization of a creed.' "[161]

Brennan concluded that the remedial program violated the *Lemon* requirements that "neither the State nor Federal Government shall promote or hinder a particular faith or faith generally through the advancement of benefits or through the excessive entanglement of church and state in the administration of those benefits."[162]

The conclusory nature and perfunctory reasoning of Brennan's majority opinion drew a series of sharp dissents, revealing that several members of the Court were no longer willing to take separationism to the limit. Chief Justice Burger, then in his last year on the Court, seemed appalled at the use to which the test he had devised in *Lemon* had been put. Focusing on the "human cost" of the Court's decision, he caustically expressed his doubt that "programs designed to prevent a generation of children from growing up without being able to read effectively" were steps toward an established church:

> The notion that denying these services to students in religious schools is a neutral act to protect us from an Established Church has no support in logic, experience, or history. Rather than showing . . . neutrality . . . it exhibits nothing less than hostility toward religion and the children who attend church-sponsored schools.[163]

Justice White, a longtime dissenter from the Court's interpretation of the establishment provision in school cases, took the occasion to reiterate his view that those decisions were "not required by the First Amendment and were contrary to the long-range interests of the country."[164]

Justice Rehnquist's dissent took the Court to task for striking down the program on the basis of a

> "Catch-22" paradox of its own creation . . . whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause

161. 473 U.S. at 414 (quoting *Lemon*, 403 U.S. at 650 (opinion of Brennan, J.)).

162. 473 U.S. at 414.

163. 473 U.S. at 419-20 (Burger, C.J., dissenting).

164. School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 400 (1984) (White, J., dissenting from the decisions in both *Aguilar* and *Grand Rapids*).

> an entanglement. . . . [W]e have indeed traveled far afield from the concerns which prompted the adoption of the First Amendment when we rely on gossamer abstractions to invalidate a law which obviously meets an entirely secular need.[165]

It was Justice O'Connor's dissent, however, that delivered the most telling criticisms of the indifference to practical consequences that characterized the majority's opinion. Indeed, her opinion in *Aguilar* stands as the definitive rebuke to the Court's general approach to establishment issues from 1947 onward. She chided the majority for its lack of attention to the actual operation of the program it struck down, for the abstract character of its reasoning, and for its apparent unconcern with the effects of the decision on the lives and prospects of 20,000 special needs children from the poorest families in New York City, as well as children in similar programs in other parts of the country.

> This holding rests on the theory . . . that public school teachers who set foot on parochial school premises are likely to bring religion into their classes, and that the supervision necessary to prevent religious teaching would unduly entangle church and state. Even if this theory were valid in the abstract, it cannot validly be applied to New York City's 19-year-old Title I program. The Court greatly exaggerates the degree of supervision necessary to prevent public school teachers from inculcating religion, and thereby demonstrates the flaws of a test that condemns benign cooperation between church and state.[166]

Justice O'Connor thought it useful to describe the Title I program more fully than the majority had. She began by noting that the program represented Congress' recognition that "poor academic performance by disadvantaged children is part of the cycle of poverty," and its consequent decision to make a special effort to reach children who would not receive the educational services they needed without governmental assistance.[167] The sole reason disclosed by the record for offering classes funded under Title I on the premises of parochial schools, she noted, was that "alternative means to reach the disadvantaged parochial school students — such as instruction . . . at the nearest public school . . . were unsuccessful."[168] The record afforded little basis, she pointed out, for the fears of the majority that " 'state-paid instructors, influenced by the pervasively sectarian nature of the religious schools in which they work, may subtly or overtly indoctrinate the students in particular religious tenets at public expense' "; that

165. *Aguilar*, 473 U.S. at 420-21 (Rehnquist, J., dissenting).

166. 473 U.S. at 421 (O'Connor, J., dissenting).

167. 473 U.S. at 422.

168. 473 U.S. at 423.

state-provided education in religious school buildings threatens to convey a message of state support for religion to students and the general public; and that the program subsidizes the religious function of the parochial schools by taking over a substantial portion of their secular education.[169] In fact, the record disclosed not a single instance of religious "inculcation" or advancement by the public teachers during the nineteen years the program had been in operation. In sum, she concluded that the majority's "abstract theories" about how the program in question "might possibly advance religion dissolve in the face of experience in New York City."[170]

The absence of evidence to support the majority's fear of religious advancement was hardly surprising in O'Connor's commonsensical view:

> New York City's public Title I instructors are professional educators who can and do follow instructions not to inculcate religion in their classes. They are unlikely to be influenced by the sectarian nature of the parochial schools where they teach, not only because they are carefully supervised by public officials, but also because the vast majority of them visit several different schools each week and are not of the same religion as their parochial students.[171]

With some asperity, she remarked that it is "not intuitively obvious that a dedicated public school teacher will tend to disobey instructions and commence proselytizing students at public expense merely because the classroom is within a parochial school."[172]

What was abundantly clear, and what the majority had slighted, according to O'Connor, was that the Title I program had provided significant benefits to the public and the students. The record showed that "impoverished school children are being helped to overcome learning deficits, improving their test scores, and receiving a significant boost in their struggle to obtain both a thorough education and the opportunities that flow from it."[173] As for the majority's contention that the supervision necessary to prevent the inculcation of religion creates excessive entanglement, she pointed out that the degree of supervision required "does not differ significantly from the supervision any public school teacher receives, regardless of the location of the classroom." If extensive supervision were really necessary to prevent the public school teachers from inculcating religion, she pointed out, that "would require us to close our public schools, for there is always

169. 473 U.S. at 423-24 (quoting *Grand Rapids*, 473 U.S. at 373).

170. 473 U.S. at 424.

171. 473 U.S. at 425.

172. 473 U.S. at 427.

173. 473 U.S. at 425.

some chance that a public school teacher will bring religion into the classroom, regardless of its location."[174] She also dismissed the majority's ritual invocation of political divisiveness, pointing again to the actual facts of the case: "There is little record support for the proposition that New York City's admirable Title I program has ignited any controversy other than this litigation."[175]

The proper way to approach the matter, Justice O'Connor argued, was through the substitute for the *Lemon* test that she had proposed the previous year.[176] "If a statute lacks a purpose or effect of advancing or endorsing religion, I would not invalidate it merely because it requires some ongoing cooperation between church and state or some state supervision to ensure that state funds do not advance religion."[177]

The Justice closed her opinion with a consideration of the practical effects of the majority's holding. She noted that public school students would be unaffected, and that some parochial school students might be spared the loss of instruction under Title I through "programs offered off the premises of their schools — possibly in portable classrooms just over the edge of the school property."[178] The unlucky children who would "lose" are "those in cities where it is not economically and logistically feasible to provide public facilities for remedial education adjacent to the parochial school. But this subset is significant, for it includes more than 20,000 New York City schoolchildren and uncounted others elsewhere in the country."[179] For that large group of needy children, she said, the decision in *Aguilar* was "tragic."[180]

> The Court deprives them of a program that offers a meaningful chance at success in life, and it does so on the untenable theory that public school teachers (most of whom are of different faiths than their students) are likely to start teaching religion merely because they have walked across the threshold of a parochial school. . . . I cannot close my eyes to the fact that, over almost two decades, New York City's public school teachers have helped thousands of impoverished parochial school children to overcome educational disadvantages without once attempting to inculcate religion. Their praiseworthy efforts have not eroded and do not

174. 473 U.S. at 428-29. For illustrations of Justice O'Connor's point, see Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991) (state university professor interjected religious beliefs during instructional time); Roberts v. Madigan, 702 F. Supp. 1505 (D. Colo. 1989), *aff'd.*, 921 F.2d 1047 (10th Cir. 1990) (elementary school teacher silently read Bible during classroom hours in view of students).

175. 473 U.S. at 429.

176. *See* Lynch v. Donnelly, 465 U.S. 668, 694 (1984).

177. *Aguilar*, 473 U.S. at 430 (O'Connor, J., dissenting).

178. 473 U.S. at 430-31.

179. 473 U.S. at 431.

180. 473 U.S. at 431.

threaten the religious liberty assured by the Establishment Clause.[181]

Like the *McCollum* case that had squelched efforts at interfaith cooperation in Illinois nearly four decades earlier,[182] *Aguilar* deployed abstract separationist logic and baseless evocations of sectarian strife to strike down a benign legislative program worked out by Congress after extensive cooperative effort with and testimony from a wide variety of religious organizations. Moreover, the decision seemed to place religion, alone among human activities, in a suspect category. Normally, a litigant challenging a governmental action would have the burden of showing that the activity in question violated the Constitution. But *Aguilar* inverted the usual presumption, by striking down the remedial program because the government could not prove there would never be unconstitutional advancement of religion by public school teachers.[183] By making the eradication of government support for religion the chief aim of establishment provision interpretation, the Court had gone to extremes in striking down forms of governmental accommodation of religious belief and exercise of the sort that are in place in every other tolerant, liberal, democracy.[184]

At first glance, it seems difficult to reconcile Justice Brennan's exaggerated suspicion regarding religion in the *Aguilar* case with his vigorous advocacy of aggressive free exercise protection stretching back to his *Sherbert* opinion in 1963.[185] But his uncompromising separationism in establishment cases and his commitment to protecting certain types of free exercise are both consistent with his view of the Supreme Court's role as a bulwark against majoritarian tyranny and as the champion of selected individual and minority rights. The place of the First Amendment's religion guarantee in Justice Brennan's judicial philosophy is illuminated by comparing his *Aguilar* opinion with a dissent he filed three years later in a free exercise case, where he attacked the Court's majority for insensitivity to the associational religious rights of members of a minority religion.

In *Lyng v. Northwest Indian Cemetery Protective Association*,[186] the Court held that the free exercise provision did not prohibit the federal government from allowing timber harvesting in, or the construction of a road through, a portion of government-owned property, even though

181. 473 U.S. at 431.

182. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1943); *see supra* text accompanying notes 47-48.

183. Mark E. Chopko, *Has U.S. Society Become Anti-Religious?*, CATHOLIC LEAGUE NEWSLETTER, Nov. 1991, at 5, 11.

184. *See* CHARLES L. GLENN, CHOICE OF SCHOOLS IN SIX NATIONS (1989).

185. Sherbert v. Verner, 374 U.S. 398 (1963); *see supra* text accompanying notes 71-84.

186. 485 U.S. 439 (1988).

the land in question had traditionally been used for religious purposes by members of three American Indian tribes, and the proposed activity would have a serious impact on their religious life.[187] Justice Brennan's dissent stressed the effect the proposed activity would have on a fragile religious community:

> As the Forest Service's commissioned study . . . explains, for Native Americans religion is not a discrete sphere of activity separate from all others, and any attempt to isolate the religious aspects of Indian life "is in reality an exercise which forces Indian concepts into non-Indian categories."[188] . . . Thus, for most Native Americans, "[t]he area of worship cannot be delineated from social, political, cultu[ral], and other areas o[f] Indian lifestyle." . . . A pervasive feature of this lifestyle is the individual's relationship with the natural world; this relationship, which can accurately though somewhat incompletely be characterized as one of stewardship, forms the core of what might be called, for want of a better nomenclature, the Indian religious experience.[189]

Justice Brennan demonstrated in *Lyng* that he was well able to understand that more than just the individual free exercise of the relatively few Indians who used the sacred site was at stake. "Although few Tribe members actually make medicine at the most powerful sites, the entire Tribe's welfare hinges on the success of the individual practitioners."[190] He also showed himself able, on this occasion, to take an ecological view of free exercise, as Chief Justice Burger had done in *Yoder*.[191] Justice Brennan noted that "we have recognized that laws that affect spiritual development by impeding the integration of children into the religious community or by increasing the expense of adherence to religious principles — in short, laws that frustrate or inhibit religious *practice* — trigger the protections of the constitutional guarantee."[192] What was at stake in *Lyng*, he saw, was not merely the free

187. 485 U.S. at 451-53.

188. 485 U.S. at 459 (Brennan, J., dissenting) (quoting D. THEODORATUS, CULTURAL RESOURCES OF THE CHIMNEY ROCK SECTION, GASQUET-ORLEANS ROAD, SIX RIVERS NATIONAL FOREST (1979)).

189. 485 U.S. at 460 (quoting *American Indian Religious Freedom, Hearings on S. J. Res. 102 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 2d Sess. 86 (1978) (statement of Barney Old Coyote, Crow Tribe) [hereinafter *Hearings*]).

190. 485 U.S. at 462.

191. Wisconsin v. Yoder, 406 U.S. 205 (1972); *see supra* text accompanying notes 131-44.

192. 485 U.S. at 469 (Brennan, J., dissenting); *see also* Justice Brennan's concurring opinion in Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987), in which he described the connection between individual free exercise and protecting the autonomy of religious communities:

> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. . . . Solicitude for a church's ability to [define itself] reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.

483 U.S. at 342 (Brennan, J., concurring).

exercise of the individuals who actually used the disputed sites, but the entire communities to which they were spiritually connected.

Justice Brennan's eloquent and persuasive description of the way in which Native American religion is inextricably woven into the rest of life implied that such integration is alien to the Western tradition. To "attempt to isolate the religious aspects of Indian life," he claimed, "is in reality an exercise which forces Indian concepts into non-Indian categories."[193] But those "non-Indian categories" that rigidly separate the secular and the religious are not part of some generic "Western" inheritance, as Brennan seemed to assume. They are the product of a particular philosophy that has found its fullest expression only in the laws of countries attached to pre-1989 communism, and in certain decisions of the U.S. Supreme Court to which he himself had been a major contributor.

The categories Brennan found so inappropriate to Native American religion in *Lyng* would strike many other Americans as equally inapplicable to *their* religious experience. For a fundamental error of many of the religion cases Justice Brennan participated in was precisely their failure to recognize that, for vast numbers of American women and men, religion is as inseparable from the rest of social life as it is for the Native Americans involved in *Lyng.* For many, perhaps most, Americans, "[t]he area of worship cannot be delineated," as Brennan stated in *Lyng,* "from social, political, cultu[ral], and other areas" of life.[194]

How, then, is one to explain the difference between the Brennan of the establishment cases and the Brennan of the free exercise cases? Why did he treat religion as a private individual experience in the former, while he was, on occasion, ready to see it as inseparable from the rest of life and associational in the latter? One might try to reconcile the positions by arguing that in both sets of opinions he was merely attempting to enforce government neutrality, in the establishment cases blocking government favoritism and in the free exercise cases government hostility. This explanation founders, however, on the artificiality of the distinction between the two classes of cases. Which, for example, evinces more government favoritism for a religion — a government program that permits a public school teacher to teach remedial reading to poor students, including those who happen to attend religious schools *(Aguilar),* or a government decision to divert one of

193. 485 U.S. at 459 (Brennan, J., dissenting) (quoting D. THEODORATUS, *supra* note 188).

194. 485 U.S. at 459-60 (quoting *Hearings, supra* note 189).

its roads, built on public land, in order to protect the area for worship by a particular religious group *(Lyng)?*

The apparent contradiction disappears, however, if we hypothesize that Brennan's approach to the religion provisions was driven by a vision of constitutionalism in which the Bill of Rights was primarily a charter for judges to defend individuals and small or unpopular minority groups against majoritarian infringement. In this light, Brennan's Religion Clause jurisprudence is all of a piece. In the establishment cases, he used separationism as a device to block what he perceived as attempts by large religious groups to expand their role in public life. In free exercise cases, he was comfortable with governmental accommodation to protect individuals and small or unpopular religious minorities. In the former, he characterized religion as individual and private; in the latter, he could envision it as associational and inseparable from other aspects of life. He shifted easily from one mode of Religion Clause interpretation to the other as the occasion demanded.

Justice Brennan's vision of the Religion Clauses as checks on state power designed primarily to protect those individuals who are not members of the numerically dominant faiths prevailed on the Court through the period of the rights revolution. Looking back over the development of Religion Clause jurisprudence from the first incorporation cases up to *Aguilar,* one can see that this body of law is not quite so incomprehensible as it is often said to be. To be sure, it is not notably characterized by the reasoned elaboration of principles grounded in constitutional text or tradition. Nor does it display much evidence of a sustained collegial effort to discern the underlying purposes and values of the religion provisions of the First Amendment, and to effectuate them in a reasonably consistent way. Nevertheless, and despite some anomalies, the fact patterns and outcomes in these cases do reflect with a fair degree of consistency a strict separationist vision with an antimajoritarian gloss. That approach produced credible analyses of individual and minority free exercise cases, but regularly sacrificed freedom of religion to the value of separation in establishment cases. As Justice Kennedy was to observe as the Court moved into a new phase, this approach created "classes of religions based on the relative numbers of their adherents," and consigned "religions enjoying the largest following . . . to the status of least favored faiths."[195]

By the mid-1980s, however, the hold of strict separationism was

195. Allegheny v. A.C.L.U., 492 U.S. 573, 677 (Kennedy, J., concurring in part and dissenting in part) (1989).

less secure on a changing Court.[196] In retrospect, 1985 was a watershed year in Religion Clause interpretation, for dissents filed in two cases decided that year provided strong pragmatic and theoretical justifications for reconsidering at least the establishment precedents. Justice O'Connor's *Aguilar* dissent laid bare the destructiveness of the mechanical separationist approach in practical and human terms. Justice Rehnquist, dissenting in *Wallace v. Jaffree,* made it plain that strict separationism had no basis in constitutional text, history or tradition.[197] In both cases, Justice Powell had provided a crucial fifth vote for the separationist view.[198] In 1986, Rehnquist became Chief Justice upon Burger's retirement, and Antonin Scalia joined the Court. When Anthony Kennedy took Powell's seat the following year, the Court seemed poised to take a fresh look at the religion language of the First Amendment.

III. The Emerging Deference Doctrine

In the Religion Clause decisions of the Rehnquist Court, a new approach has begun to emerge, but its contours are not yet fully clear. The salient characteristic of the emerging approach is the disposition on the part of an otherwise fragmented majority to exercise great restraint in setting aside the decisions of other branches of government in the church-state area. Thus the Court has produced decisions upholding legislation that previously might have been seen as violating the Establishment Clause,[199] but it has also refused to invalidate regulations or laws that burden individual,[200] associational,[201] and institutional[202] free exercise. This trend has prompted some observers to conclude that the Court is effectively removing the religious freedom guarantee from the Bill of Rights by relegating most of the problems

196. Mueller v. Allen, 463 U.S. 388 (1983) (Establishment Clause not violated by Minnesota statute permitting parents of parochial school students to deduct tuition, textbook, and transportation expenses); Marsh v. Chambers, 463 U.S. 783 (1983) (Establishment Clause not violated by Nebraska legislature's chaplaincy practice); Lynch v. Donnelly, 465 U.S. 668 (1984) (Establishment Clause not violated by inclusion of creche in Pawtucket, Rhode Island's Christmas display).

197. *See supra* notes 31-35 and accompanying text.

198. Aguilar v. Felton, 473 U.S. 402 (1985), was a five-to-four decision. *Wallace* was a six-to-three decision with O'Connor concurring only in the judgment.

199. Board of Educ. v. Mergens, 110 S. Ct. 2356 (1990); Bowen v. Kendrick, 487 U.S. 589 (1988).

200. Employment Div. v. Smith, 110 S. Ct. 1575 (1990); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987); Goldman v. Weinberger, 475 U.S. 503 (1986); Bowen v. Roy, 476 U.S. 693 (1986).

201. Lyng v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439 (1988).

202. Hernandez v. Commissioner, 490 U.S. 680 (1989); Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990).

in the area to the political process.[203]

In retrospect, the transition to the new stance seems to have begun in the final years of the Burger Court in a free exercise case that by itself did not clearly prefigure a move to an across-the-board posture of deference. *Goldman v. Weinberger* involved a citizen caught in a conflict between his religious obligation, as an orthodox Jewish rabbi, to wear a yarmulke, and the dress regulations of the U.S. Air Force, which required him to keep his head uncovered while on duty indoors.[204] Justice Rehnquist's opinion for the Court, rejecting Captain Goldman's claim for an exemption from the military dress code on free exercise grounds, did not treat the case as presenting a conflict between an individual and government in the abstract, but rather as involving Captain Goldman's obligations to a unique form of community. Quoting from an earlier opinion to the effect that " 'the military is, by necessity, a specialized society separate from civilian society,' "[205] Rehnquist described the requirements of the military community at some length.

> The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. . . . The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service."[206] . . . "[W]ithin the military community there is simply not the same [individual] autonomy as there is in the larger civilian community."[207]

Declining to apply the compelling interest standard of *Sherbert* to the special situation of the military, Rehnquist said, "[W]hen evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."[208] The Court's deference in *Goldman* to the Air Force's considered judgment that its dress code fostered "the overall group mission" was not mere reflexive yielding to "government."[209] It was, rather, an acknowledgment of the importance of the military as an essential and special society within the

---

203. *See* Edward M. Gaffney et al., *An Open Letter to the Religious Community,* FIRST THINGS, Mar. 1991, at 44, 45; Laycock, *supra* note 152, at 12; Richard John Neuhaus, *Polygamy, Peyote, and the Public Peace,* FIRST THINGS, Oct. 1990.

204. 475 U.S. 503 (1986).

205. 475 U.S. at 506 (quoting Parker v. Levy, 417 U.S. 733, 743 (1974)).

206. 475 U.S. at 507 (quoting Orloff v. Willoughby, 354 U.S. 83, 92 (1953)).

207. 475 U.S. at 507 (quoting Parker v. Levy, 417 U.S., 733, 751 (1974)).

208. 475 U.S. at 507.

209. 475 U.S. at 508.

larger society, and of the need of that unique subgroup to order the conditions for its own proper functioning and development. What gives the *Goldman* case its special poignancy is that Captain Goldman was also subject to obligations imposed on him by another community, a community of faith that he had not "joined" but to which he simply belonged. He was not asserting his individual preference against the dress code, but rather his duty to another code.

Justice O'Connor, in dissent, acknowledged the force of the military's position, but stressed that there was, after all, a constitutional right weighing heavily on the other side of the dispute.[210] Justice Brennan's dissent, by contrast, accorded no weight at all to the judgment of the Air Force about what conditions were necessary to maintain its discipline and esprit.[211] He took the occasion to express more explicitly than ever his particular reading of the religion provisions of the First Amendment as protecting "the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar."[212]

Shortly after *Goldman* was decided, the Court was faced with another claim for a free exercise exemption from a generally applicable regulation. Unlike in *Goldman,* however, the regulation involved in *Bowen v. Roy*[213] was not constitutive of a community. It concerned, instead, the ultimate symbol of the bureaucratic state, the social security number that citizens are required to possess and present in order to be eligible for certain welfare benefits. The perceived need to avoid unduly burdening the operation of government seemed to induce the majority in *Roy* to deny an exemption to Native American parents who claimed that assigning a social security number to their infant daughter would violate their religious beliefs by "robbing her spirit" of the ability to attain greater spiritual power.[214] Chief Justice Burger, in one of his last opinions for the Court, expressed the concern that,

210. 475 U.S. at 528-29 (O'Connor, J., dissenting). Congress apparently agreed, for soon after *Goldman* was decided, the United States Code was amended to provide a limited free exercise exemption from military dress requirements, reserving, however, a generous measure of discretion to the Secretary:

> [A] member of the armed forces may wear an item of religious apparel while wearing the uniform of the member's armed force [except] (1) [where] the Secretary determines that the wearing of the item would interfere with the performance of the member's military duties; or (2) if the Secretary determines . . . that the item of apparel is not neat and conservative.

10 U.S.C.A. § 774 (West Supp. 1991).

211. *Goldman,* 475 U.S. at 516-17 (Brennan, J., dissenting).

212. 475 U.S. at 524.

213. 476 U.S. 693 (1986).

214. 476 U.S. at 696.

given the diversity of America's religions and the pervasiveness of modern government, "virtually *every* action that the Government takes, no matter how innocuous it might appear, is potentially susceptible to a Free Exercise objection."[215] Given "the necessity of providing governments with sufficient operating latitude," he concluded, "some incidental neutral restraints on the free exercise of religion are inescapable."[216] Justice O'Connor, dissenting in part, emphasized, as she had in *Goldman*, that an important constitutional right was at stake for the plaintiffs. This time, the government's bare assertion of "administrative efficiency" was on the other side of the scales.[217]

Bowen v. Roy was followed by a succession of cases where, as in *Roy*, free exercise claims were in conflict with regulatory interests of government. In these, the Court continued to defer to the judgment of public institutions without inquiring deeply into the rationality or necessity of the governmental interest involved, or the severity of the burden on individual, associational, or institutional free exercise. In *O'Lone v. Estate of Shabazz*,[218] the Court denied a group of Muslims' claim for an exemption from generally applicable prison work requirements. In *Lyng v. Northwest Indian Cemetery Protective Association*,[219] the Court held the government did not need to show a compelling interest to justify the "incidental" burden on religion resulting from public logging and construction activities in a part of National Forest land Native American groups had traditionally used for religious purposes. Institutional free exercise claims fell before the taxing power in *Hernandez v. Commissioner*,[220] where the Court deferred to the decision of the Internal Revenue Service to deny a charitable deduction for certain payments made to the Church of Scientology by its members; and in *Jimmy Swaggart Ministries v. Board of Equalization*,[221] which upheld the imposition of state sales taxes on the dissemination of religious material. In *Tony and Susan Alamo Foundation v. Secretary of Labor*, the Court held that a nonprofit religious organization was not exempt from the minimum wage requirements of the Fair Labor Standards Act.[222]

These rulings culminated in an explicit abandonment of strict scru-

215. 476 U.S. at 707 n.17.

216. 476 U.S. at 712.

217. 476 U.S. at 730 (O'Connor, J., dissenting).

218. 482 U.S. 342 (1987).

219. 485 U.S. 439, 450-51 (1988); *see also supra* text accompanying notes 187-94.

220. 490 U.S. 680 (1989).

221. 110 S. Ct 688 (1990).

222. 471 U.S. 290 (1985).

tiny for many types of free exercise cases in *Employment Division v. Smith,*[223] a case involving the denial of unemployment compensation to two employees of a drug rehabilitation center who had been fired from their jobs for using peyote in violation of their employer's substance abuse policy and of Oregon criminal law. Though the peyote use had been off duty in connection with a Native American religious ceremony, the state declared the men ineligible for benefits under the provision of Oregon's unemployment compensation law that disqualifies applicants who have been discharged for work-related misconduct.

The *Smith* case would have been entirely unremarkable if the Supreme Court had disposed of the matter by holding that the state's compelling interest in its drug policy outweighed the free exercise claims of the discharged employees. However, Justice Scalia's opinion for the Court not only held that Oregon might require the peyote users to forfeit unemployment benefits, but ruled the "compelling interest" standard of *Sherbert v. Verner*[224] to be inapplicable to challenges of generally applicable, religion-neutral laws.[225] He concluded that any accommodation of religious practices by means of an exemption from a generally applicable law must be provided through the political process, noting that Congress and a large number of states had in fact exempted sacramental peyote use from criminal penalties.[226]

Though Justice O'Connor concurred in the result (which she considered supported by Oregon's interest in enforcing its drug policy), she took strong issue with the majority's abandonment of the compelling interest standard. As in *Goldman* and *Roy,* she insisted that virtual abandonment of scrutiny is inappropriate when a constitutional right is at stake.[227] The disagreement between Justices O'Connor and Scalia on the proper standard of review brings into sharp focus the current division on the Court over free exercise issues. Justice O'Connor's point that the protection of free exercise cannot constitutionally be left entirely to the political process is a powerful one, but so is Justice Scalia's point that generally applicable laws with an incidental effect on religious exercise cannot be deemed presumptively unconstitutional.

---

223. 110 S. Ct. 1595 (1990).

224. 374 U.S. 398 (1963); *see supra* text accompanying notes 71-84.

225. 110 S. Ct. at 1603, 1604 n.3.

226. 110 S. Ct. at 1606. One year after *Smith* was decided, the Oregon legislature exempted from criminal penalties the use of peyote in connection with "good faith practice of a religious belief." Since the two men involved in *Smith* had used peyote as guests at a religious ceremony, this exemption for people practicing the religion may not have applied to them. *Oregon Peyote Law Leaves 1983 Defendant Unvindicated,* N.Y. TIMES, July 9, 1991, at A14.

227. 110 S. Ct. at 1610-13 (O'Connor, J., concurring).

Each Justice has recognized the validity of the other's argument. As O'Connor acknowledged in *Lyng,* "[G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires."[228] And as Scalia conceded in his dissent in *Texas Monthly v. Bullock,* the Court cannot simply accept at face value a state's evaluation of the respective worth of its own regulatory objectives versus a claimant's interest in exercising his or her religion free of state interference.[229] What *Smith* brings out into the open is the degree to which the Court in prior cases had finessed free exercise problems by paying lip service to a compelling interest test, while in fact according a lower level of scrutiny to asserted governmental interests.[230]

A principled, intermediate balancing approach to free exercise seems indicated. But what has blocked the development of a consensus on some such approach is the same problem that is responsible for the disarray of establishment law: the lack of a clear judicial sense of the purpose and meaning of the Constitution's religion language. Until the Court squarely faces and reaches an operating consensus on those issues, balancing will be but another name for the more or less arbitrary exercise of discretion, and outcomes of important cases will continue to depend on mere majority vote.

The experiences of other liberal pluralistic democracies suggest that the development of a principled balancing test in the free exercise area is not an impossible task, and that the difficulties of administering it would be no greater than those involved with other constitutional rights.[231] This not to say that Justice Scalia's concerns about releasing a flood of religion-based litigation are unfounded, nor that he errs in regarding bright-line rules as useful litigation-avoidance devices. The difficulties that Scalia anticipates, however, derive in large part from weaknesses of the American civil litigation system. There is no doubt that it is more difficult to discourage frivolous claims in the United States than in countries where court procedures, and rules on costs and fees, are more effectively deployed toward that end. But responsi-

228. 485 U.S. at 452.

229. 489 U.S. 1, 29-45 (1989) (Scalia, J., dissenting).

230. In *Smith,* Justice Scalia observes, "Although we have sometimes purported to apply the *Sherbert* [compelling interest] test in contexts other than [unemployment compensation], we have always found the test satisfied . . . ." 110 S. Ct. at 1602; *see also* McConnell, *supra* note 152, at 1127 ("[T]he Supreme Court before *Smith* did not really apply a genuine 'compelling interest' test. . . . Even the Justices committed to the doctrine of free exercise exemptions have in fact applied a far more relaxed standard to these cases . . . . The 'compelling interest' standard is a misnomer.").

231. See, for example, the decisions of the Federal Constitutional Court of Germany collected in DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 444-503 (1989).

bility for these shortcomings of our legal system should not be taxed against the exercise of a fundamental freedom.

Meanwhile, on the establishment front, the Court has also been adopting a more deferential posture. A glimmer of a possible shift in that direction appeared as early as 1983, when the Court by a five-to-four majority in *Mueller v. Allen* upheld a Minnesota law permitting parents to take a state tax deduction for certain educational expenses incurred in sending their children to parochial schools.[232] *Committee for Public Education & Religious Liberty v. Nyquist,* which in 1973 had invalidated a state law providing public funds for repair of private school buildings and a form of tuition grant to parents of private school children,[233] was distinguished. The Court made a somewhat more decisive move toward increasing its deference to legislative judgments in 1988 in *Bowen v. Kendrick,*[234] where it upheld a federal program that provided grants to public and private entities (expressly including religious organizations) for services and research related to teenage sexuality and pregnancy. The Adolescent Family Life Act (AFLA), passed by Congress in 1981 in response to the " 'severe adverse health, social, and economic consequences' that often follow pregnancy and childbirth among unmarried adolescents,"[235] provided for grants "to public or nonprofit private organizations or agencies 'for services and research in the area of premarital adolescent sexual relations and pregnancy.' "[236] Grants under the Act were intended to serve several purposes, including the promotion of self-discipline among adolescents, the encouragement of adoption, the development of new approaches to the delivery of care and services for pregnant adolescents, and the support of basic research into the problems associated with adolescent pregnancy.[237]

Among the services that could be funded under AFLA were pregnancy testing, maternity and adoption counseling, referral services, prenatal and postnatal health care, provision of nutritional information, child care, mental health services, and educational programs relating to family life and problems associated with adolescent premarital sexual relations. But Congress placed certain restrictions on the grant money: no funds were to go to demonstration projects for family planning services (unless such services were not otherwise

232. 463 U.S. 388 (1983).

233. 413 U.S. 756 (1973); *see supra* text accompanying note 130.

234. 487 U.S. 589 (1988).

235. 487 U.S. at 593 (quoting 42 U.S.C. § 300z(a)(5) (Supp. IV 1986)).

236. 487 U.S. at 593 (quoting S. REP. No. 161, 97th Cong., 1st Sess. 1 (1981)).

237. 487 U.S. at 593-4; 42 U.S.C. § 300z(b)(1)-(4) (1988).

available in the community), to groups that provide abortions or abortion counseling, or to groups that advocate, promote, or encourage abortions.

The controversy these restrictions generated unfortunately eclipsed the fact that the AFLA represented a serious and important congressional experiment with an alternative method of delivering much-needed social services. The Senate committee report on the bill had frankly acknowledged "the limitations of Government in dealing with a problem that has complex moral and social dimensions," and stated the committee's belief that "promoting the involvement of religious organizations in the solution to these problems is neither inappropriate or illegal."[238] The thought was, apparently, that the use of nongovernmental structures might help provide social services in a less costly and more effective way than the public sector had been able to accomplish. The AFLA consequently provided that federally funded services in this area should promote the involvement of parents of the affected children and should "emphasize the provision of support by other family members, religious and charitable organizations, voluntary associations, and other groups."[239] The effort to secure broad-based involvement of nongovernmental groups was intended by Congress to " 'establish better coordination, integration, and linkages' among existing programs in the community, . . . to aid in the development of 'strong family values and close family ties' and to 'help adolescents and their families deal with complex issues of adolescent premarital sexual relations and the consequences of such relations.' "[240]

Controversy over the family planning provisions, coupled with the fact that a number of AFLA grant recipients had institutional ties to religious denominations, resulted in a legal challenge to the program as violating the Establishment Clause doctrine formulated in *Lemon.* When that lawsuit came before the Court in 1988, Chief Justice Rehnquist examined the constitutionality of AFLA under the *Lemon* test. He found that the first prong of the test, the requirement of a secular purpose, was satisfied because the AFLA was aimed at the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood. This purpose was not rendered impermissible because it coincided in some respects with the beliefs of certain religious organizations. The inclusion of religious organiza-

238. 487 U.S. at 617-18 (quoting S. REP. No. 161, *supra* note 236, at 15-16).

239. 487 U.S. at 596 (quoting 42 U.S.C. § 300z(a)(10)(C) (1982)).

240. 487 U.S. at 596 (quoting 42 U.S.C. § 300z(a)(10)(A), (a)(10)(C), (b)(3) (1982 & Supp. IV 1986)).

tions among the grantees to help achieve these goals also had a secular purpose, namely, to "improve the effectiveness of the Act's programs."[241] On this point, the Court cited the testimony of a witness before the Senate Committee to the effect that " 'projects which target hispanic and other minority populations are more accepted by the population if they include sectarian, as well as non-sectarian, organizations in the delivery of those services.' "[242] As Mark Chopko has observed, "The goal of serving a genuinely pluralistic community is not achieved by uniform delivery of services by only one type of provider."[243]

The Constitution does not rule out such diversified approaches, according to Rehnquist. The Establishment Clause, he wrote, did not prohibit Congress from recognizing the

> important part that religion or religious organizations may play in resolving certain secular problems. . . . [I]t seems quite sensible for Congress to recognize that religious organizations can influence values and can have some influence on family life, including parents' relations with their adolescent children.
>
> . . . .
>
> . . . The propriety of this holding, and the long history of cooperation and interdependence between governments and charitable or religious organizations is reflected in the legislative history of the AFLA.[244]

The controversy surrounding the AFLA's inclusion of religious groups among grantees illustrates the dramatic shift in the role of religion in American society that has occurred since the Bill of Rights was adopted. For Americans in the eighteenth century, and "indeed for generations thereafter, free exercise of religion included freedom of religious groups to take an active part in regulating family responsibilities, education, health care, poor relief, and various other aspects of social life that were considered to have a significant moral dimension."[245] Gradually, the state has taken over many of the functions formerly left to religious communities, achieving control over the pro-

---

241. 487 U.S. at 605 n.10.

242. 487 U.S. at 2572 n.10 (quoting S. REP. No. 496, 98th Cong., 2d Sess. 10 (1984)); *see also* Susan Chira, *Black Churches Renew A Mission: Education,* N.Y. TIMES, Aug. 7, 1991, at A1.

243. Mark E. Chopko, *Intentional Values and the Public Interest — A Plea for Consistency in Church/State Relations,* 39 DEPAUL L. REV. 1143, 1179 (1990).

244. *Kendrick,* 487 U.S. at 607, 609. Though the Court held the statute was not facially invalid, *Kendrick* did not eliminate the chilling effect of *Lemon* on legislative experimentation with cooperative arrangements with religious organizations. The case was remanded to the district court for continued litigation concerning whether any of the grants made pursuant to the statute were actually being administered in a way that violated the *Lemon* bans on advancing religion or excessive entanglement. 487 U.S. at 622.

245. Harold I. Berman, *Religious Freedom and the Challenge of the Modern State, in* ARTICLES OF FAITH, *supra* note 120, at 42.

vision of most primary and secondary education in the nineteenth century, and increasing its presence in the social service area as the American version of the welfare state developed in the twentieth.

Now that welfare states all over the world seem to be sensing the limits of their ability to provide social services through public agencies, many governments are exploring partnerships with private organizations, including religious groups. Religious organizations, traditional providers of social services, especially in the areas of education and health care, will be important resources for societies endeavoring to reach the largest numbers of needy citizens in the most efficient, effective, and humane ways possible. When we forbid such joint efforts, "[n]ot only are we substantially deprived of the option of enlisting church-related social service institutions (a large and richly experienced institutional sector) in implementing public programs, but their exclusion often makes it difficult for government to act through private sector institutions at all," because politicians are loath to appear to be discriminating against their religious constituents.[246]

Under the strict separationist approach favored by what was by then a group of dissenters in *Kendrick,* the participation of religious groups in creative new approaches to homelessness, child care, and care for victims of AIDS and other disabling illnesses would be sharply restricted. Though Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, agreed that the AFLA had a legitimate secular purpose, he argued that it violated the *Lemon* test by advancing religion. "Whereas there may be secular values promoted by the AFLA," Justice Blackmun wrote, "including the encouragement of adoption and premarital chastity and the discouragement of abortion, it can hardly be doubted that when promoted in theological terms by religious figures, those values take on a religious nature."[247]

Moreover, Blackmun speculated, statutes like the AFLA might actually pose a threat to participating religious groups. By enlisting their aid in carrying out social programs while subjecting them to First Amendment restrictions, he warned,

> we risk secularizing and demeaning the sacred enterprise. Whereas there is undoubtedly a role for churches of all denominations in helping prevent the problems often associated with early sexual activity and unplanned pregnancies, any attempt to confine that role within the strictures of a government-sponsored secular program, can only taint the religious mission with a "corrosive secularism."[248]

246. MORGAN, *supra* note 27, at 41.

247. *Kendrick,* 487 U.S. at 639 (Blackmun, J., dissenting).

248. 487 U.S. at 640 n.10 (quoting School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985)).

The "strictures" to which Blackmun refers, of course, were imposed not by the First Amendment, but by the *Lemon* test and its predecessors. *Kendrick* demonstrated, however, that a majority of the Court was increasingly uneasy with *Lemon*'s rigid categories.

But, as a case decided the following year plainly revealed, the Justices who were dissatisfied with *Lemon* were far from united on what to do about it. In *County of Allegheny v. American Civil Liberties Union,* a group of plaintiffs had brought an action challenging, on establishment grounds, the display of a nativity scene and a menorah on public property during the December holiday season.[249] The plurality opinion, authored by Justice Blackmun, held that the display of the creche violated *Lemon*'s prohibition against advancing religion, while the display of the menorah next to a Christmas tree in another location did not.[250] Like other symbol cases, the *Allegheny* decision seems to us to be more interesting for the light it sheds on the assumptions under which the Justices were operating than for its result.

Justice O'Connor concluded that the results were justifiable on the basis of "careful line drawing" under the unique circumstances of each case, but she warned that the Court must avoid "drawing lines which entirely sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion."[251] She took the occasion to advance again the substitute for the *Lemon* test that she had formulated and proposed in an earlier case involving a Christmas display, *Lynch v. Donnelly.*[252] The proper way to approach establishment cases, she suggested, was to review each challenged governmental practice "in its *unique circumstances* to determine whether it constitutes an endorsement or disapproval of religion."[253] This endorsement test, she explained, rested on the recognition that Court decisions regarding matters of great moment send "messages" to the public at large. The proposed test, she argued, "captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.' "[254]

249. 492 U.S. 573 (1989).

250. 492 U.S. at 621.

251. 492 U.S. at 623 (O'Connor, J., concurring in part and in the judgment) (citation omitted).

252. 465 U.S. 668 (1984).

253. 492 U.S. at 625.

254. 492 U.S. at 627 (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment)).

Justice Kennedy, in an opinion joined by Chief Justice Rehnquist and Justices Scalia and White, concurred in the holding that there was no Establishment Clause violation in the case of the menorah, but dissented from the holding that the creche display advanced religion. The much-criticized *Lemon* test, he argued, accorded too little latitude for recognizing the central role of religion in society to serve as the Court's primary guide for resolving establishment cases. Like Justice O'Connor, he was concerned about the message the Court's religion decisions were sending. But whereas she concentrated primarily on the dangers of an exclusionary message to nonadherents, his attention was fixed mainly on the undesirability of a message of hostility to religion. Two limiting principles, Justice Kennedy suggested, were available in the Court's precedents to prevent legitimate accommodation of religion from becoming illegitimate establishment:

> [G]overnment may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so."[255]

The old, strict, separationist view was maintained in *Allegheny* by Justices Brennan, Marshall, and Stevens, all of whom joined in opinions written by Brennan and Stevens, concurring in the Court's decision to bar the creche and dissenting from the decision to permit display of the menorah.[256]

The next year, the fragmented *Lemon* critics in *Allegheny* joined in an opinion upholding against an establishment challenge the application of the federal Equal Access Act to require a high school to extend the same privilege to a student religious group to meet on school premises after hours as it had extended to nonreligious student groups and clubs.[257]

As matters stood in the fall of 1991, six members of the high court were on record as dissatisfied with *Lemon v. Kurtzman*'s separationist test for determining whether the establishment provision had been violated.[258] The Court seemed on the verge of replacing *Lemon,* either

255. 492 U.S. at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

256. 492 U.S. at 637 (Brennan, J., concurring in part and dissenting in part).

257. Board of Educ. v. Mergens, 110 S. Ct. 2356 (1990).

258. For Justices Kennedy, Scalia, O'Connor, Rehnquist, and White, see *Allegheny,* 492 U.S. at 655-56 (Kennedy, J., concurring in the judgment in part and dissenting in part). Justice David Souter, when asked in his confirmation hearings about his view of the Court's approach to church-state issues, commented, "The concerns that have been raised about [the *Lemon* test] naturally provoke a search, not only perhaps for a different test of the standard which we think we are applying today, but a deeper re-examination about the very concept behind the establish-

with the deferential standard proposed by Justice Kennedy, under which government would be forbidden only to coerce or proselytize, or with the modified separationist test proposed by Justice O'Connor, under which government would be barred from "endorsing" religion.[259] Together with the retreat from the compelling interest test in cases involving requests for exemptions from generally applicable laws, the adoption of the Kennedy, or even the O'Connor, standard would move the Court closer to a unified, across-the-board deferential approach in church-state matters.

A new posture of deference would have certain virtues. It would be more respectful of the significant regional cultural variations that exist in this country, of local control, and of democratic political processes. It would relieve the courts, to a great extent, from having to make decisions on such perplexing issues as the definition of a religion, the sincerity of a person's religious belief, and the relative weight of governmental interests and burdens on religious belief and practice. It would facilitate governmental utilization of mediating structures to help deliver a variety of badly needed social services. In so doing, it might help to promote important forms of free exercise, especially by permitting legislatures to help parents regain a measure of control over their children's moral and educational development. That so much attention and energy have been expended on litigation over prayer in the public schools is symptomatic, we believe, of displaced concern about a deeper issue: the growing sense of many parents that they do not have a meaningful say in their children's education.[260]

Ultimately, however, simply adopting a more deferential test will not promote a better understanding of how the free exercise and establishment portions of the Religion Clause should interact to protect religious freedom. A mechanically applied deferential approach could

---

ment clause." Linda Greenhouse, *Supreme Court to Take Fresh Look at Disputed Church-State Boundary,* N.Y. TIMES, Mar. 19, 1991, at A16.

259. More compatible with the structural method advocated here would be an approach that would take as its starting point the positive liberty created by the First Amendment's religious freedom guarantee and the governmental obligations flowing therefrom. The protection of religious freedom would seem to require liberty-enhancing governmental accommodation, but not sponsorship, of religious expression. For an attempt (pre-*Allegheny*) to work out the appropriate scope and limits of an evenhanded accommodationist approach aimed at promoting religious pluralism as a public value while protecting individual and institutional religious freedom from governmental interference, see Michael W. McConnell, *Accommodation of Religion,* 1985 SUP. CT. REV. 1. In a later article, McConnell wrote: "The Court should not ask, 'Will this advance religion?,' but rather, 'Will this advance pluralism?' The Court should not ask, 'Will this be religiously divisive?,' but rather, 'Will this tend to suppress expression of religious differences?' " McConnell, *supra* note 24, at 1516.

260. *See Parents Support Choice For Schools, Poll Finds,* N.Y. TIMES, Aug. 23, 1991, at D18; *see also* Ellen Goodman, *Parents Overwhelmed by the Culture,* WASH. POST, Aug. 17, 1991, at C9, and *infra* Part IV.

be subversive of individual, associational, and institutional free exercise, especially where small, unconventional, or unpopular religions are concerned. As Justice Scalia bluntly acknowledged in *Employment Division v. Smith,* "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in . . . ."[261] Indeed, near-automatic deference to the elected branches would pose a menace to free exercise by members of America's diverse assortment of larger religious groups as well. For the emerging deferential approach raises doubts about the extent to which the Court will continue to accord constitutional scrutiny to governmental use of taxing and regulatory powers to infringe on religious organizations. If *Smith* does, as many fear, represent the Court's adoption of a reflexive, mechanical form of deference, the results could be as inimical to religious freedom as they were under the old separationist approaches.[262]

Neither rigid separationism nor mechanical deference comports with the language and history of the Constitution, for as Justice O'Connor pointed out in her concurring opinion in *Smith,* the First Amendment requires positive protection for the religious liberty of Americans. "[T]he First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a 'constitutional nor[m],' " a "preferred" right, singled out by the Framers for "special protections."[263]

In our view, however, *Smith* does not necessarily portend a definitive move to a rigid and mechanical posture of deference. In the first place, Justice Scalia's opinion for the Court does not purport to represent a comprehensive reordering of a body of law that took over forty years to become unprincipled and unworkable. Second, the bare result of the case, amply justified by Oregon's drug enforcement policy, is scarcely an innovation. And third, the *Smith* opinion itself acknowledges the continuing need for careful scrutiny in certain types of cases.

The principal problem with *Smith* — as with *Bowen v. Roy,*

261. 110 S. Ct. 1595, 1606 (1990).

262. Michael McConnell has compiled an admonitory list of examples of the inroads into religious freedom that might result if the Court adopts a reflexive deferential approach: orthodox Jews could be required to end sexual segregation in their places of worship; Catholic doctors in public hospitals could be fired for refusing to perform abortions; public school students might be forced to attend sex education classes contrary to their faith; orthodox Jewish athletes might be excluded from sports teams unless they relinquished their religious head covering; prisons would not be required to respect the dietary laws binding Jewish or Muslim prisoners; the Catholic church might be required to hire female priests; and historic preservation laws might be used to prevent churches from making theologically significant alterations to their structures. McConnell, *supra* note 152, at 1142-43.

263. 110 S. Ct. at 1612 (O'Connor, J., concurring) (quoting McConnell, *supra* note 259, at 9).

O'Lone v. Estate of Shabbaz, Hernandez v. Commissioner, and *Jimmy Swaggart Ministries v. Board of Equalization* — is the current majority's readiness to accept unsupported government assertions about the nature and strength of its interests, without reckoning the likely burdens in each case on free exercise.[264] As Justices O'Connor and Kennedy have rightly emphasized, the Court's religion decisions not only resolve disputes brought before the Court but also send "messages" to the public and to the other branches of government.[265] *Smith,* in its broadest implications, would cancel the wholesome message of earlier free exercise decisions to legislators, administrators, local officials, school boards, and the like that the Constitution requires government to accommodate religious practices where it can do so without seriously burdening governmental interests. As Michael McConnell has pointed out, "[m]any, if not most, of the accommodations found in state and federal statutes were enacted in response to the argument that they were constitutionally required."[266]

We consider it unlikely that the broadest statements in *Smith* will be taken to their limits by the current majority. Keeping in mind that it required decades for the law in the church-state area to arrive at its present tangled condition, it seems reasonable to expect a few fits, and even false starts, as the Court strives to work out a better way of dealing with the sensitive and immensely complex issues involved in these cases. It is possible, of course, that the Rehnquist Court, like previous Courts, will, without much deliberation, brush the freedom of religion aside while it pursues an unrelated constitutional agenda. *Smith* may, as some fear, be the decisive step toward a reflexive majoritarianism as insensitive to the concerns of "incorrigibly religious" Americans as was the antimajoritarianism of the rights revolution. But a more plausible trajectory is that *Smith* in time will come to be seen as mainly explicable in relation to a strong national policy relating to a severe national problem. That is, just as *Bob Jones* is more of an antidiscrimination case than a Religion Clause case, so *Smith* may turn out to be primarily a drug case — a step, rather than a landmark, in the process of rationalizing and reconstructing Religion Clause case law.

The current Court's dissatisfaction with the old strict separationist approach and its more recent, weaker versions presents the Court with an opportunity to reconstruct its Religion Clause jurisprudence. Having cleared away the barriers imposed by the "wall of separation," the

264. *See supra* notes 220-31 and accompanying text.

265. *See supra* notes 252-55 and accompanying text.

266. Michael McConnell, The Amazing, Disappearing, Free Exercise Clause (unpublished manuscript on file with the authors).

Court can begin to knit together the severed halves of the Religion Clause, orienting both toward the service of religious freedom. The demise of the rigorously separationist approach may release "free exercise" from its narrow interpretation and from its long subordination to a broad construction of "establishment." If the Court were to begin to restore both parts of the Religion Clause to the service of freedom of religion, the problem of developing principled limits on free exercise would become more susceptible of reasoned resolution. For it would be seen not as governed by the extra-constitutional principle of separationism, but as involving the interplay of free exercise with other constitutional values, of varying weights under the circumstances of actual cases.[267]

The new posture of deference, it seems to us, is the first stage of a gradual transition to a flexible but principled approach that will treat the Religion Clause as a whole. The foundations of such a reconstruction of Religion Clause law are already present in various decisions, dissents, and concurrences authored by members of the *Smith* majority. Prominent among the elements that can be expected to promote the development of a more principled and workable body of Religion Clause law are Chief Justice Rehnquist's careful attention to history in *Wallace v. Jaffree,*[268] his often-expressed solicitude for the role of religion as a mediating structure,[269] and his Hamiltonian respect for federalism and the separation of powers. Justice O'Connor has displayed a serious concern with the religion issues as they bear on the lives of citizens,[270] solicitude for all points of view,[271] a prudent inclination to proceed cautiously case by case,[272] and a persistence in demanding factual and legal justification.[273] These traits will be essential to bringing

267. *See infra* Part IV.

268. 472 U.S. 38 (1985). *See supra* notes 31-35 and accompanying text; *infra* notes 298-306 and accompanying text.

269. *See infra* notes 288-96 and accompanying text.

270. For example:

> Judicial review of government action under the Establishment Clause is a delicate task. The Court has avoided drawing lines which entirely sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion.

Allegheny County v. A.C.L.U., 492 U.S. 573, 623 (1989) (O'Connor, J., concurring in part and in the judgment).

271. *E.g.*, "There is an element of truth and much helpful analysis in each of these suggestions . . . ." Wallace v. Jaffree, 472 U.S. 38, 79 (1985) (O'Connor, J., concurring in the judgment) (referring to critiques of existing establishment tests).

272. For example, her discussion of the need for careful line-drawing in *Allegheny,* 492 U.S. at 623 (O'Connor, J., concurring in part and in the judgment).

273. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 421 (1985) (O'Connor, J., dissenting) (questioning assertion that public school teachers tutoring on premises of religious schools will necessarily inculcate religion).

the rich resources of traditional common law judging to bear on problems to which the Court in the past has given short shrift.[274] Another likely important factor is Justice Kennedy's constant alertness to the ways that purported neutrality can mask hostility to religion, a concern that in many cases cannot be alleviated without some scrutiny of the purposes and effects of laws that appear to be neutral on their face.[275] Finally, Justice Scalia's fresh reading in *Smith* of the free-exercise decisions may have opened the way to a more holistic approach of the type that we advocate here. After *Smith,* it seems more likely that future Religion Clause cases will continue to be resolved in the light of the interplay among various constitutional values.

Justice O'Connor best summed up the current state of affairs in a speech on the bicentennial of the Religion Clause in the spring of 1991. The Court, she said, was "at a crossroads," with existing doctrine "quite fragile" and with the members of the Court "narrowly and deeply divided."[276] The only certainty was that debate among the members of the Court would continue and that the problems would not be susceptible of easy resolution. We find her sober assessment encouraging, for it suggests that the current Court may be prepared to accord the Religion Clause the serious attention it has long merited and seldom received.[277]

IV. STRUCTURAL FREE EXERCISE

With hindsight, the innocent catalyst for the train of events that brought Religion Clause jurisprudence to its present tangled state seems to have been the piecemeal approach to incorporation. The process of reviewing the various parts of the Bill of Rights separately, at intervals, set the stage for interpreting the establishment and free exercise provisions as embodying independent sets of ideas, thus obscuring their common purpose. An earnest struggle at the time of incorporation with the special interpretive difficulties that incorporation presented in the religion area would in all probability have averted

274. Justice Souter, like Justice O'Connor, was an experienced state court judge before joining the Court. As of May 1991, his voting pattern resembled that of Justice O'Connor more closely than that of any other Justice. Linda Greenhouse, *Another Frantic Finish Looms for High Court,* N.Y. TIMES, May 16, 1991, at A20.

275. *Allegheny,* 492 U.S. at 655 (Kennedy, J., dissenting in part); Board of Educ. v. Mergens, 110 S. Ct. 2356 (1990).

276. Reported in Rob Boston, *Religious Liberty at the Crossroads,* CHURCH & STATE, July-Aug. 1991, at 4, 5.

277. The Court heard oral argument in *Lee v. Weisman,* a challenge to the constitutionality of prayers at public school graduation ceremonies, on November 6, 1991. *See* Linda Greenhouse, *Justices Appear Wary in Argument Over Prayer at School Graduations,* N.Y. TIMES, November 7, 1991, at A14.

many subsequent missteps. But the Court's early resort to the simplistic "wall" metaphor ensconced separationism as an end in itself, thereby driving a wedge between the free exercise and establishment provisions and creating the appearance of tension between them. The two-clause approach in turn produced two largely separate bodies of case law. Moreover, the adoption of bright-line tests for establishment cases and balancing tests for free exercise meant that the classification of a dispute as a free exercise or establishment case was often determinative of its outcome.[278] Over time, court majorities gave a narrow construction to free exercise, neglecting its associational and institutional aspects. These important dimensions of religious freedom further suffered from the Court's broad construction of the First Amendment's establishment language. The effect was to regularly subordinate the free exercise of religion to the policy of enforcing a rigid separation of church and state. In case after case, as we have seen, the First Amendment was thus turned on its head.

Ordinarily, a question of constitutional interpretation of such difficulty and import would galvanize the legal academy. Constitutional law scholars, however, for the most part have uncritically accepted the Court's ahistorical approach. With a few notable exceptions,[279] they, too, have tended to treat nonestablishment as the basic end to which some derogation might cautiously be allowed in order to accommodate the free exercise of religion. Laurence Tribe, for example, in his widely used treatise, describes the free exercise provision as "carv[ing] out" a "zone" where "permissible accommodation" of religious interests may take place.[280]

From time to time, the advance of the separationist position was interrupted, as we have seen, when Court majorities drew back from taking it to its furthest logical extremes.[281] Various explanations have been advanced for these occasional aberrations: Justice Douglas' ambitions for the presidency for a brief period in the 1950s;[282] Justice

278. *Developments in the Law, supra* note 9, at 1609-10, 1723 n.101 (1987).

279. *See especially* McConnell, *supra* note 24; NOONAN, *supra* note 11.

280. TRIBE, *supra* note 9, at 1169.

281. Walz v. Tax Commn. of New York, 397 U.S. 664 (1970) (upholding against establishment challenge a statute granting tax exemptions to religious organizations for religious properties used solely for religious purposes as part of a larger scheme of exemptions for property used exclusively for religious, educational, or charitable purposes); Board of Educ. v. Allen, 392 U.S. 236 (1968) (upholding against establishment challenge a state law requiring local public school authorities to lend textbooks free of charge to all students in grades 7-12, including those in private religious schools); Zorach v. Clauson, 343 U.S. 306 (1952) (upholding against establishment challenge a statute which required the release, at parents' request, of public school students during the school day to attend religion classes); *see also supra* notes 107-21 and accompanying text (discussing *Walz*).

282. In 1952, Douglas maintained that the Constitution was never meant to require equal

Brennan's concern for the associational rights of selected minority groups during his long tenure on the bench; and what Mark Tushnet has called a "marginality principle" permitting the free exercise of religion when the issue at stake seemed harmless or unimportant to secular-minded judges.[283] Occasionally, as when the Court upheld the traditional tax exemption for church property in *Walz,* the Justices seemed to realize that the logic of extreme separationism was profoundly threatening to the religious liberty of millions of Americans. These sporadic departures from separationism prompted friends and foes of the principle to castigate the Court for inconsistency.[284] In retrospect, however, as we have shown, the Court was fairly consistent for some forty years in pursuing an individualistic, secularist, and separationist approach to religion cases.

A majority of the members of the current Court now appear to have concluded that the Religion Clause jurisprudence of the past fifty years is seriously flawed. They are far from unanimous, however, on their diagnosis of the problems, or on their idea of the appropriate remedies. A loose coalition on the current Court has come perilously close to disposing of the difficulties in the area by throwing the First Amendment's religious freedom guarantee out with the bathwater of forty years of separationist case law.[285] Their emerging deferential approach could, in effect, "unincorporate" the religion language of the First Amendment. This, it seems to us, would be a regrettable outcome. For the effect would be to send a message that religious freedom is not "implicit in the concept of ordered liberty,"[286] and that the freedom the Framers placed first in the Bill of Rights is not entitled to a prominent place on the twentieth century's "honor roll of superior rights."[287]

As we have argued, however, that is not the inevitable trajectory of the current Court's reconsideration of a body of law that took many decades to reach its present unworkable state. Discernible in the opinions of a majority of the current Justices are the elements of a new approach that we call structural free exercise. We use the word *struc-*

---

treatment for nonbelievers, and he espoused a view of free exercise that encompassed each religious organization's freedom to "flourish according to the zeal of its adherents and the appeal of its dogma." Zorach v. Clauson, 343 U.S. 306, 313 (1952). In the 1970s, however, he warned against augmenting the power of "organized religion" in Wisconsin v. Yoder, 406 U.S. 205, 247 (1972) (Douglas, J., dissenting in part), and "religious organizations" in Walz v. Tax Commn. of New York, 397 U.S. 664, 700 (1970) (Douglas, J., dissenting).

283. Tushnet, *supra* note 9, at 723.

284. *See* sources cited *supra* note 9.

285. *See supra* text accompanying notes 199-231, 261-66.

286. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

287. *See* ABRAHAM, *supra* note 7, at 74.

tural in an organic, rather than a mechanical, sense to refer to the relations within and among texts, and between legal and social institutions. The structural approach situates the religion language within its historical and literary context. It takes into consideration the institutional and associational, as well as the individual, aspects of religious freedom. It is informed by an awareness of the role of America's religions in the cultural foundations of the democratic experiment.

Much of the theoretical groundwork for a structural approach to the Religion Clause can be found in various writings of Chief Justice Rehnquist. In 1978, then-Justice Rehnquist gave the keynote address of a University of Miami Law School lecture series on the topic "The Adversary Society."[288] In that speech he chose to stress the crucial roles that nongovernmental institutions play in our society. He expressed concern about the pressure on the courts from ideological litigants to resolve controversies that previously had been left largely to regulation by other social and political institutions. Noting the disruptive effect that adversarial proceedings can have on ongoing social relations and structures, he suggested that protection of such relations and structures ought to be one factor in policymakers' evaluation of the desirability of alternative methods of dispute resolution.

As an example of an appropriate sensitivity to the need to protect the internal autonomy of social structures from governmental interference, he cited the Supreme Court's 1976 refusal, in *Serbian Eastern Orthodox Diocese v. Milivojevich,*[289] to overturn the decision of an ecclesiastical tribunal regarding a property dispute between two factions of a church. In a democracy, Justice Rehnquist explained, it is sometimes necessary to reject certain claims of individuals, and to attach "special weight" to institutions, like unions, churches, and other communities of memory and mutual aid. "While this should not confer upon them . . . a power to ride roughshod over the claims of individuals," he said, occasional deference to such institutions is justified in situations where "adversary litigation of the propriety of [internal] decisions would have more disadvantageous consequences in terms of diminishing the usefulness of the institution than would the ultimate resolution by the court of the claim of individual right."[290] At the conclusion of his lecture, he reflected, "Those who make our laws . . . serve us poorly if they do not recognize that the world in which we live is an intricate web of relationships between people, private institutions

288. *See* William H. Rehnquist, *The Adversary Society,* 33 U. MIAMI L. REV. 1 (1978).

289. 426 U.S. 696 (1976).

290. Rehnquist, *supra* note 288, at 8, 18.

and government at its various levels."[291]

As Chief Justice, Rehnquist has carried forward the vision of federalism, the separation of powers, and the institutions of civil society outlined in the Miami speech. In *Bowen v. Kendrick*,[292] he made it clear that the Court was not disposed to cooperate with litigants bent on using the establishment provision to undermine legislative efforts to include religious organizations along with other mediating structures in programs designed to attack pressing social problems. The reason Congress had expressly mandated the participation of a variety of community organizations — religious groups among them — in the teenage pregnancy program, he pointed out, was "to spark the development of new, innovative services."[293] Signaling that ideological plaintiffs would in the future find it more difficult to block such experiments, he wrote: "Nothing in our previous cases prevents Congress from . . . recognizing the important part that religion or religious organizations may play in resolving certain secular problems."[294] He pointed to the country's "long history of cooperation and interdependency between governments and charitable or religious organizations," and to the fact that the provision of social services by religiously affiliated charitable groups has long taken place without controversy and with community support.[295] "This Court," he said, "has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs."[296]

Bowen v. Kendrick thus represented a significant repair of the road that had led to *Aguilar v. Felton*.[297] A thorough reconstruction, however, would have to begin with the abandonment of the *Lemon* test, and the assumption of the long-neglected task of interpreting the Religion Clause in the light of its history and purposes. The Chief Justice laid down the basis for that essential work in his scholarly dissent in *Wallace v. Jaffree*.[298] Canvassing the history of the provision, including the pertinent statements of the Framers, the actual organization of church-state relations in the various states at the time the Bill of Rights was adopted, and the evidence concerning the way the religion

291. *Id.* at 18.

292. 487 U.S. 589 (1988); *see supra* notes 234-48 and accompanying text.

293. 487 U.S. at 604.

294. 487 U.S. at 607.

295. 487 U.S. at 609.

296. 487 U.S. at 609.

297. 473 U.S. 402 (1985). *See supra* notes 157-85 and accompanying text.

298. *See supra* notes 31-35 and accompanying text.

language had been understood during the nineteenth century, Rehnquist found the record barren of any suggestion that the establishment language makes separationism a distinct goal, rather than a means to promote religious freedom. The Chief Justice's examination of the proceedings of the first Congress leading up to the adoption of the First Amendment, the actions of the first and subsequent Congresses touching on religious matters, and the writings of leading nineteenth-century constitutional commentators also confirmed that nothing in the establishment provision had been intended to require the government to be neutral as between religion and nonreligion.[299] All the evidence suggested a "well-accepted meaning" for the establishment provision: The Framers intended the Establishment Clause to prohibit the designation of any "national religion" and "forbade preference among religious sects or denominations."[300]

> The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson.*[301]

The Chief Justice went on to concede that a lack of historical basis for the "theory of rigid separation"[302] would not in itself be a reason to begin anew if the theory in operation had yielded a unified and principled body of case law. The record of decisions from *Everson*[303] onward, however, showed that the opposite had been the case. "Whether due to its lack of historical support or its practical unworkability, the *Everson* 'wall' has proved all but useless as a guide to sound constitutional adjudication."[304] The *Lemon*[305] test, he continued, suffered from the same defects as the wall concept. It lacked any grounding in the language or purpose of the First Amendment, and it had proved incapable of generating adequate standards for the principled decision of Religion Clause cases.[306]

---

299. Also concluding that protection of free exercise was not meant to apply to nonreligion are Jesse H. Choper, *Defining "Religion" in the First Amendment,* 1982 U. ILL. L. REV. 579, 597-604, Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses,* 41 STAN. L. REV. 233, 236 (1989), and McConnell, *supra* note 24, at 1495.

300. Wallace v. Jaffree, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting).

301. 472 U.S. at 106.

302. 472 U.S. at 106.

303. Everson v. Board of Educ., 330 U.S. 1 (1947); *see supra* notes 22-45 and accompanying text.

304. 472 U.S. at 107.

305. Lemon v. Kurtzman, 403 U.S. 602 (1971); *see supra* notes 125-29 and accompanying text.

306. 472 U.S. at 110.

A. *The Religion Language in Context*

Rehnquist's dissent in *Wallace v. Jaffree* prepared the way for the Court to undertake the careful interpretive process that should have occurred in the 1940s, a process that would commence, in the usual way, with a consideration of the textual passage as a whole, in the light of its history, purposes, and its relation to other parts of the Bill of Rights. When and if the Court proceeds to that step, however, its path will not be free of difficulty. Consider the familiar language of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[307]

Grammatically, this famous sentence contains no "clauses" at all. (A clause, the reader will recall from school days, is a word group containing a subject and a predicate, and constituting part of a compound or complex sentence.[308]) The First Amendment is what grammarians call a simple sentence. Its structure contains a subject (Congress), a verb (shall make), and an object (law), followed by three participial phrases serving as adjectival modifiers that tell us what kind of law Congress is forbidden to make. The word *clause,* of course, has an additional meaning. Thus, according to *Webster's Second,* a clause can also be "[a] short sentence, a separate portion of a discourse or writing; a distinct article, stipulation, or proviso, in a formal document."[309] It is in this sense that lawyers speak of the "clauses" of contracts, statutes, pleadings, wills, treaties, and constitutions. And it is in this sense that the First Amendment may be said to contain a clause, or clauses, pertaining to religion.

But which is it? Are there two separate propositions — that Congress may not establish a religion and that Congress may not prohibit the free exercise of religion? Or is there but one proposition — that Congress may not interfere with freedom of religion, either by establishing a religion or by otherwise prohibiting its free exercise? The interpretive problem is not free of difficulty.

Nor is it entirely clear from the text precisely what sort of activity Congress was banned from undertaking in the establishment area. If

---

307. U.S. CONST. amend. I.

308. The second edition of Webster's *New International Dictionary* (1958) defines a "clause," in the grammatical sense, as "[a] word group formed by subject and predicate elements but constituting a member of a complex or compound sentence instead of ranking as a completed sentence."

309. *Id.*

the intent was solely to prevent the founding of a national religion, why does the establishment phrase not simply say so? The broader formulation chosen — forbidding Congress to make any law "respecting an establishment of religion" — suggests that the Framers' purpose was not merely to promote freedom of religion by banning a national religion, but to insulate and protect the various existing state-level arrangements from congressional interference.[310] The meaning of this language, and the puzzle of whether and how to make it applicable against the states, posed formidable problems that the Court in the incorporation era simply ignored.

What light, if any, does the First Amendment context of the religion language shed on these questions? The First Amendment, read as a whole, forbids Congress to interfere with a group of important freedoms. The provisions dealing with religious freedom were placed first among this group, followed by the familiar protections for speech, the press, and the right of the people to assemble and to petition for redress of grievances. The structure of the amendment suggests that the subject of protection in the first participial phrase is religious freedom, just as freedom of speech, press, assembly, and petition are the subjects of protection in the following two phrases. If the two religion provisions are read together in the light of an overarching purpose to protect freedom of religion, most of the tension between them disappears. They are complementary provisions, both in the service of the same fundamental right. They bar Congress from abridging religious freedom in one specific way (by legislation "respecting an establishment of religion"), and in general ("or prohibiting the free exercise thereof").

Naturally, these interpretive questions cannot be resolved on the basis of First Amendment text and its history alone, for the First Amendment itself has a context: the Bill of Rights and the overall constitutional design for government.[311] When the religion language is situated in this larger context, further light is shed on its role within the constitutional and social order.

B. *The Religion Clause and the Structure of the Bill of Rights*

The fate of the First Amendment's religion language has been closely bound to the development of post-incorporation Bill of Rights

310. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833); Amar, *supra* note 25, at 1157.

311. As John H. Mansfield has observed, "[T]here is a need for a more encompassing and clearer view of both of the religion clauses of the first amendment and also of the relation between the religion clauses and other provisions of the Constitution." Mansfield, *supra* note 26 at 847.

interpretation generally. From the mid-1950s onward, this process was characterized by the tendency of many judges and legal scholars to place selected individual and minority rights at the apex of constitutional values. In an entirely appropriate response to pervasive racism in our society, the courts in the period of the rights revolution invoked the Equal Protection Clause of the Fourteenth Amendment to withdraw a number of issues from legislative and local control. As time went on, however, judicial practices that originated and found their justification in the historic struggle to deal with one of the nation's most serious social problems were brought into play with regard to an expanding variety of political and civil liberties. A large segment of the legal community came to regard the entire Bill of Rights as in the service of individual and minority rights.

Akhil Amar points out in a recent article that the judges and scholars who have championed individual and minority rights, regarding state and local governments as threats to those rights, have given special prominence to one part of our constitutional tradition at the expense of others.[312] What has been obscured and subordinated in this process is the older and equally important element of American constitutionalism that was designed to protect majorities ("the people") from centralized and sometimes unrepresentative control.[313] Since the Bill of Rights embodies both traditions in its interlocking parts, it cannot be read in "discrete chunks" without loss to all Americans.[314]

Amar's examination of legal scholarship on the Bill of Rights reveals that teachers and writers in the law schools have not presented the Bill of Rights holistically, as a document with certain themes whose parts are related to these themes and to one another. Instead, tracking the "peculiar logistics" of incorporation, constitutional law scholars have tended to approach the Bill of Rights as a string of discrete blocks of text, "with each bit examined in isolation."[315] In taking that approach, they have also neglected the relationship of the Bill of Rights to the rest of the Constitution, treating the design for government and the protection of individual rights in most respects as two separate domains — the former largely governed by the main body of the Constitution, and the latter belonging to the realm of the Bill of Rights.

What is of particular relevance to the problem at hand is that a clause-by-clause approach to the Bill of Rights thrusts the individual

312. Amar, *supra* note 25.

313. *Id.* at 1136.

314. *Id.* at 1131, 1201.

315. *Id.* at 1136, 1131.

rights it contains into the foreground, while obscuring the democratic themes that run through the document as a whole. As Amar neatly puts it:

> Of course individual and minority rights did constitute a motif of the Bill of Rights — but not the sole, or even the dominant, motif. A close look at the Bill reveals structural ideas tightly interconnected with language of rights; states' rights and majority rights alongside individual and minority rights; and protection of various intermediate associations — church, militia, and jury — designed to create an educated and virtuous electorate. The main thrust of the Bill was not to downplay organizational structure, but to deploy it; not to impede popular majorities, but to empower them.[316]

The tendency of contemporary judges and scholars to overlook the fact that the Bill of Rights as a whole contains important democratic themes has deprived them of an important aid to the understanding and construction of the First Amendment's religion language. Situating the religion provisions within the context of the Bill of Rights as a whole would have brought out the relationships between those provisions and the "structural ideas" Amar mentioned. Such a holistic reading lends considerable support to the view Justice Stewart plaintively voiced in *Sherbert v. Verner*[317] nearly thirty years ago that the free exercise guarantee was meant to apply to all Americans, majorities as well as minorities. It reinforces the likelihood that the establishment language was meant to protect the diverse local arrangements that the citizens of the several states had made with respect to religion. And it makes it reasonable to suppose that "the people" were to be protected, not only in their solitary individual religious beliefs and practices, but in the associations and institutions where those beliefs and practices were generated, regenerated, nurtured, promoted, and transmitted.

A structural approach also suggests that the Bill of Rights is not only a catalog of negative individual liberties, but a charter of "positive protection"[318] for certain structures of civil society, notably religious organizations, community militia, and juries. Far from being "neutral" with regard to these structures, Amendments One, Two, Six, and Seven single them out for special treatment, and not just in disputes decided by judges, for the Bill of Rights is addressed to legislators as well.

A structural reading of the Bill of Rights reminds us that the Founders attached particular importance to the kinds of rights that

316. *Id.* at 1132.

317. 374 U.S. 398, 415-16 (1963) (Stewart, J., concurring in result).

318. 374 U.S. at 415-16. *See supra* notes 81-84 and accompanying text.

help to create conditions for the exercise of other rights. When Alexander Hamilton famously described the Constitution as "itself . . . a Bill of Rights," he was calling attention to the fact that representative institutions, federalism, checks and balances, and the separation of powers all work together to help set conditions conducive to the flourishing of democratic self-government.[319] Similarly, those features of the Bill of Rights that accord constitutional status to certain intermediate associations — religious groups foremost among them — were designed in part to promote self-government by fostering participation in public life, protecting the seedbeds of civic virtue, and educating citizens about their rights and obligations. The nonestablishment provision of the First Amendment, for example, served to shelter from governmental interference " 'the pluralistic structure of the background social institutions necessary to make [religious] choice both possible and meaningful.' "[320] In this, as in other respects, it does not stand against, but works in harmony with, the free exercise provision.

A holistic reading thus suggests that individual free exercise cannot be treated in isolation from the need of religious associations and their members for a protected sphere within which they can provide for the definition, development, and transmission of their own beliefs and practices. This was Chief Justice Rehnquist's premise in his 1978 Miami lecture on our "adversarial society."[321] Contemporary commentators and courts, however, have tended to concentrate primarily on the more narrowly individual aspects of religious liberty, overlooking the fact that, for many individuals, free exercise is inherently associational.[322] With rare exceptions,[323] the Supreme Court has been relatively insensitive to the ways in which individual free exercise is mediated through organizations, and to the needs of these organizations and their members for a protected space within which each group may "flourish according to the zeal of its adherents and the appeal of its dogma."[324] Whatever the deficiencies of the Court's

319. THE FEDERALIST NO. 84, at 510, 515 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis omitted).

320. *Developments in the Law, supra* note 9, at 1638 (quoting Note, *Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self,* 97 HARV. L. REV. 1468, 1475 (1984)).

321. *See supra* notes 288-91 and accompanying text.

322. *Developments in the Law, supra* note 9, at 1742, 1770.

323. Notably, Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Wisconsin v. Yoder, 406 U.S. 205 (1972). *See also supra* notes 131-47 (discussing *Yoder*).

324. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

treatment of individual free exercise over the years,[325] they pale before its habitual unwillingness to consider how profoundly the taxing and regulatory powers of the state can interfere with free exercise in its fullest sense.[326]

It does not seem plausible that the logistics of incorporation alone can explain this continuous pattern of oversight. After all, associational freedoms have been recognized, to some degree, in other constitutional areas.[327] The fact is that in the chunk-by-chunk process of interpreting the Bill of Rights, some chunks have received more attention than others. The fate of the Religion Clause at the hands of many judges and scholars thus may reflect the legal community's implicit hierarchy among rights. To most contemporary lawyers, it seems fair to say, the mention of the First Amendment evokes, first and foremost, free speech. Indeed, in everyday legal parlance, the First Amendment is virtually synonymous with speech. This habit seems to go beyond mere mental and verbal shorthand. When Justice Cardozo committed the Court in *Palko v. Connecticut* to the proposition that some rights were more important than others, he mentioned religion as being in the preferred category, but his chief examples of important rights were freedom of speech and thought.[328] Today, Laurence Tribe speaks for many in the legal world when he describes the freedom of speech as "the Constitution's most majestic guarantee."[329] There is also a large following, especially in the academy, for Justice Brandeis' claim that "the right most valued by civilized men" is "the right to be let alone," the right of privacy.[330] Some commentators have conflated the freedom of religion with other First Amendment rights as a form of expression, or referred to it obliquely as freedom of conscience.[331] The scant space accorded to First Amendment religion issues in constitutional law texts and casebooks provides further evidence of an implicit ranking of constitutional values in which protection of religious

325. *See* McConnell, *supra* note 152; *see also* Judge Noonan's dissenting opinion in EEOC v. Townley Engg. & Mfg. Co., 859 F.2d 610, 622, 625-29 (9th Cir. 1988), cataloging the instances in which free exercise claims have been rejected by the federal courts.

326. *See especially* Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990); Texas Monthly v. Bullock, 489 U.S. 1 (1989); Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985). Douglas Laycock has commented that *Swaggart* culminates the line of cases "that savages the rights of churches as social groups or mediating institutions." Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, GEO. WASH. L. REV. (forthcoming).

327. *E.g.*, NAACP v. Button, 371 U.S. 415, 428-29 (1963) (stating that activities of NAACP "are modes of expression and association protected by the First and Fourteenth Amendments").

328. 302 U.S. 319, 324, 327 (1937).

329. TRIBE, *supra* note 9, at 785.

330. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

331. *See, e.g.*, ARCHIBALD COX, FREEDOM OF EXPRESSION 1 (1981).

freedom does not enjoy high standing.[332]

Related, probably, to the relatively low priority that religious freedom seems to enjoy in the interpretive community of lawyers is a widely accepted set of assumptions about religion. The ideas that religion is "wholly private,"[333] "an individual experience,"[334] or that a religion "worthy of respect" is the product of an individual's "choice"[335] made it difficult for those who adhered to them to attend to the associational, institutional, and ecological dimensions of Religion Clause cases.

A constitutional scholar of the critical theory school acknowledged in 1986 that "[c]ontemporary constitutional law just does not know how to handle problems of religion."[336] This unusual awkwardness on the part of legal elites with regard to issues of great moment to the overwhelming majority of our country's citizens[337] seems partially explainable in relation to the hierarchy of constitutional values and the assumptions about religion mentioned above. American church-state law also has been deeply affected, however, by a cognitive problem that is pervasive in contemporary legal culture. Religion Clause jurisprudence is a veritable museum of examples of the inability of a conceptual apparatus geared only to the individual, the state, and the market to take account of the social dimensions of human personhood, and of the social environments that individual human beings require in order to fully develop their potential.[338] Lawyers, who are trained to operate within the individual-state-market framework, have simply tended to take for granted the crisscrossing networks of associations and relationships that constitute the warp and woof of civil society. Thus, it is not surprising that scholars and judges in the 1950s and 1960s, in their zeal to increase legal protection for certain preferred liberties, gave little thought to the social costs they might be inflicting

332. See the survey provided by Douglas Laycock, *Reflections on Two Themes: Teaching Religious Liberty and Evolutionary Changes in Casebooks,* 101 HARV. L. REV. 1642, 1643 n.6 (1988) (book review). The apparent attitudes of scholars diverge markedly from what opinion polls reveal about views in the population generally. Most American men and women still place the freedom of speech exactly where the Framers of the Bill of Rights placed it, very close to, but just behind, the free exercise of religion. ROBERT O. WYATT, FREE EXPRESSION AND THE AMERICAN PUBLIC 10 (1991).

333. Everson v. Board of Educ., 330 U.S. 1, 39 (1947) (Rutledge, J., dissenting).

334. Wisconsin v. Yoder, 406 U.S. 205, 243 (1972) (Douglas, J., dissenting in part).

335. Wallace v. Jaffree, 472 U.S. 38, 53 (1985) (Stevens, J.).

336. Tushnet, *supra* note 9, at 702.

337. In 1991, the broadest and most comprehensive survey of religious attitudes ever undertaken in the United States showed that over 90% of Americans identify themselves as belonging to a religion. Ari S. Goldman, *Portrait of Religion in U.S. Holds Dozens of Surprises,* N.Y. TIMES, Apr. 10, 1991, at A1.

338. *See generally* GLENDON, *supra* note 36, at ch. 5.

on structures that help to create a culture in which human rights and dignity will be respected.

To pin so many hopes in this regard on the public schools, as some of the Justices seem to have done, was not only to overlook the potential for tyranny in state control of education, but to underestimate seriously the extent to which the public schools themselves depended, and still depend, on the support of and interaction with families and surrounding communities. Today, social conditions make it impossible to continue ignoring that these social environments — families, workplace associations, neighborhoods, religious associations — like our natural environment, are not in peak condition. It is no longer, and indeed never was, just a few small and relatively self-contained communities like the Amish or the Native Americans who are threatened by modern society's "hydraulic" pressures toward conformity.[339]

Parental concern at the grass-roots level about education has been a major factor in interfaith cooperation over the years. The primary initiators of challenges to the state's monopoly over education are not organized religions, but parents who increasingly sense that they are losing the struggle for the hearts and minds of their own children. Interfaith cooperation and support for family and student aid, as distinct from direct aid to schools, belies the notion that experiments along these lines would lead to civil strife and chaos. A 1987 *Harvard Law Review* survey of recent developments in church-state law reported that the Court has ceased to evoke political divisiveness as a reason for policing the boundaries between religion and public life.[340] Upholding a state tax exemption for private school parents in *Mueller v. Allen,* the Court remarked, "At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. . . . The risk of . . . deep political division along religious lines . . . is remote . . . ."[341]

C. *Prospects for a Structural Approach*

Though a long overdue reconsideration of Religion Clause jurisprudence from the foundations might seem improbable after all these years, we believe the current Court's thinking could well lead in that direction. Six of the present Justices are on record as dissatisfied with *Lemon v. Kurtzman*'s attempt to place mortar in the crumbling wall of

339. Wisconsin v. Yoder, 406 U.S. 205, 217 (1972) (Burger, C.J.)

340. *See Developments in the Law, supra* note 9, at 1685-86.

341. 463 U.S. 388, 400 (1983) (quoting Wolman v. Walter, 433 U.S. 229, 263 (1977) (Powell, J., concurring in part, concurring in judgment in part, and dissenting in part)).

separation.[342] Chief Justice Rehnquist's dissent in *Wallace v. Jaffree* provides a sound historical basis for tackling the neglected questions.[343] Justice White, who joined in that dissent, has pronounced himself ready on several occasions for "a basic reconsideration of our precedents."[344]

That several members of the Court are already reaching toward a holistic approach to the text suggests that such a basic overhaul might well proceed along structural lines. Justices O'Connor and Kennedy, for example, have tended to treat both religion provisions as in the service of religious liberty, though they are not in accord with what should follow from such a reading. Justice Scalia's opinion for the Court in *Employment Division v. Smith,* moreover, reveals a majority ready to take account of the interplay among the various parts of the Bill of Rights, specifically, the ways in which one constitutional value can be amplified or muted by its association with other constitutional values.[345] What Scalia referred to as "hybrid" cases requiring a higher level of scrutiny were those in which the plaintiffs' claims seemed especially strong because they were supported by mutually reinforcing constitutional rights.[346] The explicit connection Scalia recognized between the right of free exercise and the right of association may foreshadow a more capacious and less individualistic view of free exercise rights than that which has long prevailed on the Court.[347]

A structural approach to free exercise problems would not render the issues in future cases easy of resolution, but it would provide a more principled and adequately complex framework for dealing with them than the rigid approaches of the past. It would be markedly superior to complete deference, which purchases coherence and clarity, but at the price of a constitutional right. Akhil Amar has proposed another "clean solution," namely to treat the Fourteenth Amendment as "incorporating free exercise, but not establishment,

342. *See supra* note 258.

343. *See supra* notes 31-35, 298-306 and accompanying text.

344. Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (White, J., dissenting).

345. 110 S. Ct. 1595, 1601-02 (1990); *see supra* notes 223-29 and accompanying text.

346. Wisconsin v. Yoder, 406 U.S. 205 (1972); Follett v. McCormick, 321 U.S. 573 (1944); Cantwell v. Connecticut 310 U.S. 276 (1940); Murdock v. Pennsylvania, 319 U.S. 105 (1943); 310 U.S. 296 (1940); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

347. *Smith,* 110 S. Ct. at 1602: "[I]t is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise concerns." In support, Justice Scalia quoted Justice Brennan's opinion for the Court in Roberts v. United States Jaycees, 468 U.S. 609 (1983): "An individual's freedom to speak, to worship, and to petition the government . . . could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed." 468 U.S. at 622.

principles against state governments."[348] The problem with such a solution, however, is that, like the Religious Freedom Restoration Act that has been proposed in reaction to *Smith*,[349] it would perpetuate the spurious distinction between establishment and free exercise, making outcomes depend on a classification that is inherently arbitrary. If a coherent and principled approach is desired, there thus seems to be no way to avoid coming to grips with basic questions about the meaning and purpose of the Religion Clause in the light of text and tradition.[350]

Another range of thorny problems arises from the fact that free exercise, like any other right, cannot be unlimited. Institutional, associational, and individual free exercise rights, like other rights, will sometimes be in tension with each other and with other important constitutional values. The major interpretive challenge for the future, we believe, will be to accord as much scope as possible to the constitutional guarantee of free exercise in its personal, associational, and institutional dimensions, while respecting the freedom of conscience of nonbelievers and without preferring one religion to another. A virtue of a structural approach to that formidable task is that it points toward addressing problems of fairness to all Americans, whatever their beliefs, through considering the complex interplay among free exercise, free speech, and equal protection principles, rather than through rigid, mechanical separationism.

Not the least of the advantages of a holistic approach to these most delicate of problems is that fairness and tolerance enjoy a legitimacy among the population at large that crude separationism has never commanded. The Court's precedents contain much that will continue to be valuable here, for Court majorities have always vigorously expounded the importance of evenhanded treatment of all religions, and have always been solicitous of the freedom of conscience of nonbelievers.[351]

A structural approach to Religion Clause jurisprudence also will afford an occasion to provide the attention to mediating structures that Chief Justice Rehnquist called for in his Miami lecture. Recognizing the artificiality of the distinction between establishment and free exercise, the Court should now be able to use the sophisticated understanding of religion and public life it has been developing in es-

348. Amar, *supra* note 25, at 1159.

349. The Act is described in Gaffney et al., *supra* note 203, at 44.

350. *Cf.* Mansfield, *supra* note 26.

351. *See Developments in the Law, supra* note 9, at 1693.

tablishment cases like *Mueller v. Allen*[352] and *Bowen v. Kendrick*[353] in addressing the associational and institutional dimensions of those disputes that have been labeled as free exercise cases. Here, the precedents contain rich resources in the form of principles that await amplification and broader application. For example, Chief Justice Burger in *Yoder,* and Justice Brennan on several occasions, stressed the importance of "creat[ing] . . . an atmosphere in which voluntary religious exercise may flourish."[354] Justice Brennan, especially, wrote perceptively about the way in which protecting the autonomy of religious organizations protects the individual religious freedom of their members.[355] It only remains for the current Court to accord such protection to the members of all religions, large and small.

CONCLUSION

The recent Religion Clause cases show a Court majority earnestly beginning to struggle with the formidable and long-neglected interpretive difficulties of the Constitution's religion language. These Justices' rejection of mechanical separation and their acceptance of structural premises hold out the promise of a principled and workable approach to protecting the free exercise of religion in a complex, modern, pluralistic society. Pressures for simplicity and administrative convenience nudge the Court, on the one hand, toward mechanical deference and a degree of "unincorporation." A renewed respect for the cautious techniques of common law judging, on the other, tends to perpetuate separationism through the elaboration of deeply flawed precedents. The common law tradition does afford a lawyerly path through the difficulties — a structural approach that begins with text, history, and tradition, and that can, indeed must, be developed case by case in the light of present-day circumstances. Whether the Justices will unite in forging an approach along these lines, and whether they will restore religion to its rightful place in the first rank of freedoms remains to be seen.

352. 463 U.S. 388 (1983); *see supra* note 232 and accompanying text.

353. 487 U.S. 589 (1988); *see supra* notes 234-48 and accompanying text.

354. McDaniel v. Paty, 435 U.S. 618, 639 (1978) (Brennan, J., concurring).

355. Lyng v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439, 459-60 (1988) (Brennan, J., dissenting); Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 342-43 (1987) (Brennan, J., concurring); *see supra* notes 187-94 and accompanying text.